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R E P O R T S
OF
C A S E S
DECIDED IN THE
HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR,

DURING THE SESSIONS

1842 & 1843.

By C. CLARK AND W. FINNELLY, Esqrs.
BARRISTERS AT LAW.

VOL. IX.

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1844.



**JUDGES AND LAW OFFICERS
DURING THE PERIOD OF THE DECISIONS
REPORTED IN THIS VOLUME.**

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Master of the Rolls :

LORD LANGDALE.

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REPORTS OF CASES

ARGUED AND DECIDED

IN THE HOUSE OF LORDS.

CHARLES HOLLIER - - - - - *Appellant.*

1840:
April 13, 14.
May 4, 5.

ROBERT HEDGES EYRE and others - - *Respondents.*

1842:
May 2.

By deed of annuity, in consideration of 9,000 *l.* therein stated to be paid to *L. E. M.* and *M.*, the said *L.* granted to Messrs. *D. & H.* an annuity or clear yearly rent of 1,800 *l.* for three lives, charged upon his estate; and *L. E. M.* and *M.* covenanted to pay the said annuity or yearly rent, with a proviso for repurchase by them, or any or either of them. And they executed their joint and several bond and warrant of attorney to confess judgment on the bond, the judgment to be as a further security for the annuity, and to be entered forthwith against *L.* and *E.*, but not against *M.* and *M.* until default of payment, and execution not to be entered on the judgment against *L.* and *E.* until the annuity should be 40 days in arrear; and *E.*, for further securing the annuity, agreed, in the event of not becoming the purchaser of *L.*'s estate in 12 months, to assign, at *L.*'s expense, a mortgage which *E.* held on it, and also to procure the guarantie of a competent person for payment of the annuity.—

*Deed
of Annuity.
Principal
or
Surety.*

Held by the Lords (reversing the decree of the Court below), that *E.* was a principal grantor of the annuity, and not a surety.

The question, whether a person is principal or surety in the grant of annuity, is to be determined on the terms of the instruments; no extraneous evidence is admissible for that purpose (*infra*, p. 45).

Any equities between grantors of an annuity are not to affect the grantees, unless they have notice of them at the time of the grant (*infra*, p. 51).

Supplemental cases need not be lodged upon reviving an appeal which became abated after a full hearing (*infra* p. 43).

Practice.

MARCUS BLAKE LYNCH, late of *Galway*, deceased, was, in the year 1818, seised in fee of an estate in the county of *Galway* called *Barna*, subject (among other incumbrances) to a mortgage, which in 1816

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 {
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became vested in Mrs. *Mary Wilkins*, who, having shortly afterwards filed a bill of foreclosure in the Court of Exchequer in *Ireland*, obtained the usual decree for a sale in *June* 1818. By an indenture, dated the 1st of *December* 1818, *M. B. Lynch* and *Mary Wilkins* assigned the mortgage to *Robert Hedges Eyre* (the Respondent), for 5,848*l.* 16*s.* 9*d.* On the 20th of *December* 1819 the lands were set up for sale under the decree, and sold for 35,000*l.* to a person who bid in the name of *Robert Hedges Maunsell* without his knowledge ; and upon his stating that fact to the Court, he was discharged from the purchase. On the 10th of *August* 1820 the lands were again set up, and sold to a *Mr. Reddington* for 27,500 *l.*; but this sale having been considered as at an undervalue, the biddings were opened in *December* 1820, and thereupon *Edward Eyre Maunsell* was declared the purchaser, for 28,500 *l.*

The said *R. H. Maunsell* and *E. E. Maunsell*, and *George Maunsell*, hereinafter mentioned, were nephews of the Respondent *R. H. Eyre*: *E. E. Maunsell* was his attorney in the said foreclosure suit, and *G. Maunsell* was the receiver and manager of his estates in the county of *Galway*.

In order to procure a sum sufficient to make the necessary deposit of one-fourth of the said purchase money in Court, a negotiation was entered into through a *Mr. Coneys*, a friend of *M. B. Lynch*, with a *Mr. Rowley*, the solicitor of Messrs. *Henry Dawson* and *Charles Hollier*, of *London*, who agreed to lend a sum of 9,000 *l.* on an annuity of 1,800 *l.* for three lives, redeemable at the end of a year, to be secured in the manner hereinafter stated.

Accordingly, by a deed bearing date the 25th of *January* 1821, made between the said *M. B. Lynch*, *R. Hedges Eyre*, *E. E. Maunsell* and *George Maun-*

sell, of the first part ; the said *Henry Dawson* (since deceased) and *C. Hollier* (the Appellant), of the second part ; and *George Capron*, of *London*, gentleman (as trustee), of the third part ;—reciting that *Lynch, Eyre*, and the two *Maunsells*, had contracted with *Dawson* and *Hollier* for the sale to them of an annuity of 1,800*l.* (*English* money) at the price of 9,000*l.* (*English*) for the term of 99 years, if *Dawson* and *Hollier* and one *W. Watkins*, of *London*, or any or either of them, should so long live, to be charged on the lands of *Barna*, and to be secured by the joint and several bond of *Lynch, Eyre*, and *E. E.* and *G. Maunsell*, with a joint and several warrant of attorney to confess judgment against them, and also by a certain indenture of covenant relating to the said mortgage sum of 5,848*l.* 16*s.* 9*d.* ; and that upon the treaty for the sale of the said annuity, it had been agreed that the costs and charges of preparing and perfecting the securities for the same, both in *England* and *Ireland*, should be paid by *Lynch, Eyre*, and the *Maunsells*, and that the payment of the said annuity should be further secured by the covenant of a *Mr. Harman* for one year, in case default should be made in such payment for 14 days after any of the days appointed for payment of the same ; and that *R. Hedges Eyre* should enter into a covenant to procure, at the expiration of the year, a similar covenant from the said *Harman*, or some other competent person to be approved of by *Dawson* and *Hollier*, for payment of the said annuity for three years thence next ensuing, or until the same should be repurchased, and to procure similar covenants at the expiration of each period of three years whilst the annuity continued to be payable ; and also reciting that *Lynch, Eyre*, and the two *Maunsells*, had by their bond, bearing even date with these presents,

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jointly and severally become bound unto *Dawson* and *Hollier*, their executors, administrators, and assigns, in the penal sum of 18,000*l.* with warrant of attorney, to the intent that judgment should be entered up against *Lynch* and *Eyre* immediately, and against the two *Maunsells*, when default should be made in the payment of the annuity; and that the said agreement, so far as respected the mortgage sum of 5,848*l.* 16*s.* 9*d.*, and the covenant of *Harman* for payment of the annuity for one year, and the covenant of *Eyre* for procuring similar covenants from *Harman* or other competent person (as above stated), was intended to be carried into effect by separate indentures of even date with these presents:—It was witnessed, that in pursuance of the said agreement, and in consideration of the said sum of 9,000*l.* stated to be paid by *Dawson* and *Hollier* to *Lynch*, *Eyre*, and the two *Maunsells* (the receipt of which sum *Lynch*, *Eyre*, and the *Maunsells* thereby acknowledged), *Lynch* granted unto *Dawson* and *Hollier*, their executors, administrators, and assigns, one annuity or clear yearly rentcharge of 1,800*l.* payable during the term of 99 years, if *Dawson*, *Hollier*, and *Watkins*, or any or either of them should so long live, to be charged and chargeable upon the *Barna* estate, and all *Lynch*'s other property in the county of *Galway*; and he covenanted that in case the annuity should be in arrear for 21 days, *Dawson* and *Hollier* should be at liberty to enter and distrain upon the premises charged therewith; and he created a trust term of 100 years in Mr. *Capron*, for more effectually securing the annuity.

The deed then contained a covenant on the part of *Lynch*, *Eyre*, and the two *Maunsells*, to pay the said annuity, yearly sum, or rent of 1,800*l.*, when the same should become due as aforesaid; and also a covenant for title and for further assurance, on the part of

Lynch; and a stipulation on the part of *Dawson* and *Hollier*, that no execution should be issued upon the judgment to be entered up against *Lynch*, *Eyre*, and the *Maunsells*, on their bond, until the annuity should be in arrear for 40 days next after the same should become due; and also a provision to enable them, or any of them, to repurchase the annuity at the expiration of 12 months, upon giving three months' notice, and paying all costs and arrears. The receipt indorsed on the deed for 9,000 *l.* was signed by *Lynch*, *Eyre*, and *E. E.* and *G. Maunsell*.

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A bond, as recited in the deed, was executed on the same day, and also a warrant of attorney authorising judgment to be entered thereon against *Lynch* and *Eyre* forthwith, but not against the *Maunsells* until default should be made in the payment of the annuity; and a memorandum of the same date was also executed, stating that execution should not be issued on the judgment against *Lynch* and *Eyre* until default should be made in the payment of the annuity for 40 days; and that judgment should not be entered up against the *Maunsells* until default should be made in the payment of the annuity.

Articles of agreement of the same date were drawn up, reciting the deed of annuity, and the bond and warrant of attorney, and that the said *R. Hedges Eyre* was entitled to a mortgage debt of 5,848*l.* 16*s.* 9*d.* secured on the estates of *Lynch*; and that it had been agreed at the execution of the before-mentioned securities that he, *Eyre*, should, in the event of his not becoming within 12 months the purchaser of the *Barna* estate, assign the mortgage on trust to secure the payment of the said annuity, in case the same should be in arrear for 30 days after any of the days of payment; or, in case the sum secured by the mort-

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gage should be paid off within 12 months, that he, *Eyre*, should vest that sum on trust to secure the annuity; or if he should become the purchaser of the said estate, then that he should at his own expense charge it with the annuity, so that the same should be made a primary charge to the said mortgage, or the mortgage should in like manner be assigned as a primary charge to secure the annuity; and reciting, that as a further security for the annuity, the said *R. Hedges Eyre* had agreed at the time of the execution of the said securities, in case the annuity should not be paid off at the expiration of 12 months, to cause *Mr. Harman*, or some other person to the satisfaction of *Dawson* and *Hollier*, to execute a deed of covenant at *Eyre's* expense, guaranteeing the payment of the annuity so long as it should continue payable.

To these articles were annexed the following undertakings:—"We undertake to cause the said *R. H. Eyre* immediately to execute a deed, to be prepared by the solicitor of the said *H. Dawson* and *C. Hollier*, and at *Mr. Lynch's* expense, covenanting to perform the several agreements before mentioned, and conformable thereto.

R. H. Maunsell,

E. Eyre Maunsell."

"I undertake to execute a deed of covenant for the performance of the above agreement, and in every other respect to carry the arrangement into effect, but at *Mr. Lynch's* expense. *Robert Hedges Eyre."*

"I undertake, as far as I am concerned in the above agreement, to carry it into effect.

Marcus Blake Lynch."

"I concur in the above agreement.

Henry Dawson."

The deed of annuity, bond, warrant of attorney, and articles of agreement, had been prepared in *Lon-*

don, for securing an annuity of 1,600*l.* on an advance of 8,000*l.*; but on Mr. *Rowley*'s arrival in *Dublin* with them ready for execution, it was arranged between him and the *Maunsells* that the annuity should be increased to 1,800*l.*, and the consideration money to 9,000*l.* The deed and other instruments having been altered accordingly, Mr. *Rowley* proceeded with them to *Cork*, where the Respondent *R. H. Eyre* was then staying, and finding him at an hotel there late at night, obtained his signature to all the instruments. Mr. *Rowley* then returned to *Dublin*, and had the instruments executed by *Lynch* and the *Maunsells*; and by an arrangement with them, he, from the consideration money of 9,000*l.*, deducted 480*l.* 13*s.* 4*d.* for the costs of the securities and his own travelling and other expenses, and also 1,743*l.* 15*s.* for one year's payment of the annuity in advance (minus the discount), for which he gave four quarterly receipts, dated respectively the 25th of *April*, 25th of *July*, and 25th of *October* 1821, and 25th of *January* 1822. The residue, being 6,775*l.* 11*s.* 8*d.*, was handed over to *Edward Eyre Maunsell*, who paid the same into Court as a deposit for the purchase of the estate.

The sale having been again opened in *May* 1821, *Edward E. Maunsell* was a second time declared the purchaser on the 25th of *June* following, for 31,250*l.* As it then became necessary to make an increased deposit, another negotiation was carried on by him with *Dawson* and *Hollier* through their agent *Rowley*, when a further sum of 1,000*l.* was advanced by them for a further annuity of 90*l.*, to be secured in the same manner as the former. In the correspondence between *Edward E. Maunsell* and *Rowley* on that occasion, it was arranged that if the former advanced sum should be retained beyond the year, the annuity for it

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should be reduced to 810*l.*, and thenceforward the two annuities should be consolidated into one of 900*l.* *Edward E. Maunsell* some time afterwards, having procured a report of unmarketable title, obtained an order of Court to be paid back his deposit, the greater part of which was then applied in paying off incumbrances on the *Barna* estate.

From 1821 to 1825, *George Maunsell*, who was appointed receiver over *Lynch's* estates, paid the sum of 900 *l.* a year to *Dawson* and *Hollier*, being at the rate of 9 per cent. on the said two sums of 9,000 *l.* and 1,000 *l.* In *January* 1827, the annuity being then about two years in arrear, judgment was entered up on the bond in the Court of Exchequer in *Ireland*, and execution was issued thereon against the Respondent, *R. H. Eyre*, for 1,620 *l.*, being two years' arrear of the reduced annuity on the 9,000 *l.*; but no breaches having been assigned on the judgment, the execution was, on the Respondent's application, set aside on that ground.

In *October* 1828, *Dawson* and *Hollier* filed a bill in the Court of Chancery in *Ireland* against *Lynch*, *R. H. Eyre*, and the *Maunsells*, parties to the above-recited securities, and against several other persons interested in *Lynch's* estates, praying that *Lynch*, *Eyre*, and the *Maunsells* might, in consideration of the said 1,000 *l.*, grant and secure an annuity of 90 *l.* in the same manner as the former annuity of 1,800 *l.* had been granted and secured, and that the said plaintiffs might be decreed to have been entitled to such annuity of 90 *l.* from the day of payment of the said 1,000 *l.*; and also that an account might be taken of what was due to them in respect of the two annuities of 1,800 *l.* and 90 *l.*, and that the same might be paid out of the *Barna* estate.

M. B. Lynch died in *January* 1829. The said bill by *Dawson* and *Hollier* was not revived, nor any proceeding had therein. They proceeded upon the judgment entered up against the Respondent on the bond; and having suggested breaches thereon, and sued out a writ of inquiry, they obtained a verdict in *October* 1831 for 4,860 *l.*, being six years' arrears of the reduced annuity of 810 *l.*

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In *November* 1831, the Respondent, *R. H. Eyre*, filed the bill in this cause against *Dawson* and *Hollier*, making the two *Maunsells*, and the heir-at-law and personal representative of *Lynch*, parties defendants thereto; and after stating the said bill of *Dawson* and *Hollier*, and setting forth the substance of the matters hereinbefore stated, the bill prayed that *Dawson* and *Hollier* might be restrained from proceeding at law against the Respondent on the judgment obtained against him, and from issuing, or levying under, any execution obtained on the said verdict; that the securities obtained from him might be declared to be fraudulent and void as against him, if necessary, on such terms as to the Court should seem fit; and that *Dawson* and *Hollier* might be ordered to enter satisfaction on the roll of the said judgment, and to deliver up the bond to be cancelled; and that the bill might be taken as a cross bill to the said bill filed by *Dawson* and *Hollier*, &c.

The allegations in the bill to sustain this prayer were, in substance, that *M. B. Lynch* being extremely averse to the sale of his estate, induced *Edward E. Maunsell* to act in concert with him to prevent an effectual sale thereof: That the biddings and purchases by the *Maunsells* were for the benefit of and in trust for *Lynch*: That the Respondent never authorised any person to bid for him, and never entertained any

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intention of becoming a purchaser of the estate : That the negotiation for the advance of 8,000 *l.* had been nearly concluded when application was made to the Respondent to join as one of the sureties for payment of the annuity, and that he consented under the idea that the said sum would enable *Lynch* to pay the pressing creditors who had incumbrances on his estate prior to the Respondent's mortgage : That he never authorised Mr. *Coneys*, or any other person, to procure the said 8,000 *l.* for him : That the arrangement to increase the annuity to 1,800 *l.*, and the consideration to 9,000 *l.*, was concluded between *Rowley* and the other parties without any communication thereof to the Respondent : That he had been called down from his bedroom on *Rowley's* arrival in *Cork*, at an unseasonable hour of the night, and required forthwith to execute the said securities ; and then *Rowley* informed him that the sum to be advanced was increased to 9,000 *l.*, with a corresponding increase in the annuity ; and that on his return to *Dublin*, he, *Rowley*, would pay *Lynch* the 8,000 *l.*, and remit the additional 1,000 *l.* to him as soon as he should arrive in *London* : That the Respondent executed the different instruments for collaterally securing payment of the annuity, in utter ignorance, as well of the reasons which led to the alteration of the original terms of the agreement, as of the intended retention of the first year's annuity out of the consideration money : That the concealment of the arrangement in that respect was a fraud on him : That the said instruments of security showed that *Lynch* alone granted the annuity, and the Respondent and the *Maunsells* joined as sureties, particularly the undertaking by the Respondent to perform the covenant to carry the agreement into effect, "but at Mr. *Lynch's* expense :"

That the same was shown by the correspondence which took place from time to time between *Rowley* and the *Maunsells*, and also by the statements in the bill filed by *Dawson* and *Hollier* in 1828, treating *Lynch* as the principal debtor, and the Respondent merely as a surety for him: And lastly, that in *June* 1821, on the further advance of 1,000 *l.* by *Dawson* and *Hollier*, a new agreement, entirely superseding the first agreement, was entered into by *Rowley* on behalf of *Dawson* and *Hollier*, and by the *Maunsells* as the agents of *Lynch*, without any communication with the Respondent, by which it was agreed that *Dawson* and *Hollier* should release the annuity of 1,800 *l.*, and that the 9,000 *l.*, after the expiration of one year, and the said further sum of 1,000 *l.*, should be considered as a loan at 9 *per cent.* interest; and that by such new agreement the Respondent was altogether discharged from all liability on foot of the said bond. And the Respondent charged that the whole transaction having been concluded in *England*, and subject to the laws of that kingdom relating to annuities, was usurious, oppressive, and illegal, and the instruments of security were void on that ground also.

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Messrs. *Dawson* and *Hollier*, by their answer to the bill, after admitting generally several matters set forth therein and hereinbefore stated, submitted, in reference to the above allegations, that the Respondent, *R. H. Eyre*, was not merely a surety, but that he executed the several instruments before recited as a joint principal in the transaction. They denied any retention of any part of the consideration money of 9,000 *l.*, and said the proposal to pay the one year's annuity in advance was made by *Edw. E. Maunsell* to *Rowley*, stating it to be the wish of all the grantors

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to pay it, as they intended to repurchase the annuity at the end of the year; and accordingly, *Edw. E. Maunsell*, out of the 8,000*l.* handed to him by *Rowley*, discharged first the bill of costs, as he was bound to do, and also paid back to *Rowley* 745*l.* 15*s.*, which sum, together with the 1,000*l.* that *Rowley* had agreed to remit on his return to *London*, made up the year's payment of the annuity, minus the discount; and they insisted that *Edw. E. Maunsell* was the solicitor of the Respondent as well as of *Lynch*, in the whole transaction, and that the Respondent was bound by his acts. They denied that *Lynch* was the contemplated purchaser of his own estate, and stated their belief that the Respondent was the real intended purchaser, and that the biddings and purchase by *Edw. E. Maunsell* were for him, for the purpose of strengthening his political influence in the town of *Galway*, by so acquiring a control over the freehold tenants on the estate; and that that was his chief motive in taking the assignment of Mrs. *Wilkins'* mortgage, as appeared by this memorandum in writing, dated the 9th of *October* 1819, signed by *Lynch* and *E. E. Maunsell*:—"It is understood by *M. B. Lynch*, that should Mr. *R. H. Eyre* become assignee of the mortgage, his freehold interest in the county and county of the town of *Galway*, shall, by registry of freeholders, be made as respectable as possible; and that such freehold interest will be applied at any future election, either for the county or the county of the town of *Galway*, in the same manner and for the same purposes as shall receive the support of Mr. *Eyre*; and further, that the said *M. B. Lynch* shall appoint an agent over the said estates, to be mutually approved by *M. B. Lynch* and Mr. *Eyre*; and that *M. B. Lynch* will execute the necessary powers to

enable such agent to receive and apply the rents, under an arrangement by deed or by agreement to be executed by *M. B. Lynch* for that purpose; and that such understanding shall be binding as long as *Mr. Eyre* shall continue mortgagee."

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And they, by their said answer, said that *Mr. Coneys*, in opening the negotiation for the first advance of 8,000*l.*, represented to *Mr. Rowley* that he was acting for the Respondent and his nephews, as well as for *Lynch*; that they had all a common interest in the purchase of the estate by the Respondent, who was represented to be a man of large property; and they said that without his security and joint liability, they would not have advanced their money (*a*); and they denied any fraud upon, or concealment from, the Respondent, in the execution of the securities: And they stated, with respect to the alleged new agreement in *June* 1821, that *Edw. E. Maunsell*, having been then declared the purchaser of the estate, at the advanced sum of 31,250*l.*, it became necessary to obtain a further sum, in order to pay the increased deposit; and that a new agreement was entered into between the parties for a further advance of 1,000*l.* by *Dawson* and the Appellant, for the use of *Lynch*, the Respondent, and Messrs. *Maunsell*, on an annuity of 90*l.*; but denied that an entire new agreement was entered into with respect to the two annuities, by which they should release the first, and should in lieu thereof, and also for the proposed further advance of the said 1,000*l.*, receive one consolidated annuity of 900*l.*, as alleged by the Respondent's bill; but the agreement to advance the 1,000*l.*, although contemporaneous, was in itself distinct and independent; and a separate

(a) See *Rowley's Depositions*, *infra*, p. 19.

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grant and securities were to be executed for the same, with the understanding that at the expiration of one year from the 25th of *January* 1821, if the grantors should desire to keep the entire sum longer, they might do so on giving a new security for an annuity of 900*l.*, upon the terms and conditions then mentioned; but that in fact these conditions were not complied with, and no such consolidation eventually took place; however, they admitted it to be true that they did from thenceforth, up to the 25th of *January* 1825, receive the sum of 900*l.*, being the amount of what they alleged to be the reduced annuity of 810*l.*, and of the said annuity of 90*l.*: And they further contended by their answer, that as the alteration afterwards made in the original agreement was made for the benefit of the Respondent, and with his concurrence by and through *Edw. E. Maunsell*, who was his solicitor, therefore there was no ground for relieving the Respondent from any liability under the judgment obtained against him as aforesaid; and that, even if the Respondent was a mere surety, still that he was not discharged as such surety from his liability under his hand and seal, by any letters of their solicitor; and further, that although they voluntarily received the first annuity at the reduced rate of 810*l.*, as an indulgence to the several grantors thereof, so long as the same was paid, still they were entitled to what was due on the said annuity, at the full rate of 1,800*l.* They denied either the 9,000*l.*, for which the first annuity was granted, or the 1,000*l.*, the consideration for the second, were advanced as, or converted into, loans at interest; and they insisted that the securities were made and executed in *Ireland*, and not affected by the laws applicable to annuities in *England*. And as

to the bill filed in their name in 1828, they stated that they had never seen it, nor any copy or draft of it, but understood that many of the statements contained in it were erroneous, and that it was filed at the solicitation of *Edw. E. Maunsell* and his brother, *R. H. Maunsell*.

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In *June* 1833, *Dawson* and *Hollier* suggested further breaches on their judgment for 4,050*l.*, for two years and a quarter's annuity up to the 25th of *April* then last, at the rate of 1,800*l.* a year; which sum, with the 4,860*l.* before claimed, making together 8,910*l.*, the Respondent paid into Court, and obtained an injunction against their further proceeding at law, until the hearing of the cause. Mr. *Dawson* died before the hearing.

The evidence on both sides, consisting of depositions and letters, was to the following effect :—

R. H. Maunsell, examined for the Respondent, deposed that *M. B. Lynch* was in great pecuniary difficulties and in prison for debt from the year 1820 to his death in 1828: That deponent was in his confidence, and had many conversations with him in 1821 relative to the sale of the *Barna* estate, and was from those conversations enabled to say he was particularly anxious to prevent a *bonâ fide* sale: That *E. E. Maunsell* was his professional adviser and friend, and they acted in concert together with a view to prevent a *bonâ fide* sale of the estate, and deponent was aware of their object and anxious to promote it: That deponent's name as purchaser of the estate in *December* 1819, was made use of without his knowledge: That deponent had conversations and correspondence with the Respondent in the years 1820 and 1821, respecting the estate of *Barna*, but was never, nor was any other person to his knowledge, directly or indirectly authorised by the Respondent to bid for that estate as a trustee for him, or for his benefit; on the contrary, deponent knew that the Respondent was unwilling to become the purchaser, although often urged by *E. E. Maunsell* to purchase the estate in trust for the *Lynch* family: That on the sale of the estate in *December* 1820 to *E. E. Maunsell*, deponent had frequent conversation with him and with *Lynch* upon the several proceedings connected with the sale, and *E. E. Maun-*

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sell acted therein in trust for *Lynch*, who undertook to provide for the means of completing the purchase, having been at such period negotiating the loan of the money for the purpose through his friend and agent in *London*, the late *T. Coneys*, esq.: That deponent was instrumental in negotiating the loan upon annuity, and was acquainted with the principal circumstances connected with that transaction, and knew the Respondent never authorised deponent, or *Coneys*, or any other person, directly or indirectly, to obtain any sum of money for his use or benefit to be secured by annuity: That deponent never represented to *Coneys* or to any person that he was authorised by the Respondent to raise money by annuity to be applied to his own use or in conjunction with any other person, but deponent did state that the Respondent would join in a collateral security for a loan, to ensure the payment of an annuity, in default of payment by *Lynch*: That the said money was applied for the use of *Lynch*, by *Lynch*'s directions, in making a deposit of one-fourth of the purchase-money of his estate, of which *E. E. Maunsell* had become the purchaser as *Lynch*'s trustee: That previous to the execution of the annuity deed, which was brought to *Dublin* by *Rowley* ready for execution, there was a meeting at *E. E. Maunsell*'s house in *Dublin*, on the subject of the consideration, at which *Rowley* was present; and it having appeared that a guarantie of the Messrs. *Harmans*, of *London*, could not be had for the payment of the first year's annuity, as recited in the deed, *Rowley* proposed that the amount of the year's annuity should be retained by him out of the consideration money, in consequence of not having such guarantie; upon which *E. E. Maunsell* objected, that the balance after such deduction would not be sufficient to lodge the deposit: That thereupon Mr. *Meredith*, who was an assistant to *E. E. Maunsell*, proposed that the consideration should be increased by 1,000 *l.*, and the annuity increased in proportion: That *Rowley* then said he saw no objection, provided *Lynch* was satisfied; and *Rowley* and *E. E. Maunsell* went to the Marshalsea, where *Lynch* was confined, and there the matter was arranged to increase the said consideration and annuity accordingly: That in consequence of such arrangement, the deed was altered previous to the payment of said consideration money or balance thereof after the said deduction: That the proposal to make the deduction of one year's annuity was first suggested by *Rowley*, and not by *E. E. Maunsell*, and the consideration money was paid by *Rowley* to *E. E. Maunsell*, as follows:—First, the sum of 480 *l.* 13 *s.* 4 *d.* was deducted by *Rowley* for his costs and expenses respecting the annuity deed, in coming from *London*

and returning: That *Rowley* next deducted the sum of 1,800 *l.* for one year's annuity, making an allowance of 56 *l.* 5 *s.* for interest thereon at 5 *per cent.*, leaving a balance of 1,687 *l.* 10 *s.* in his hands as the first year's annuity paid in advance, and he paid over, as the consideration of the said deed, to *E. E. Maunsell*, the sum of 6,775 *l.* 11 *s.* 8 *d.* in Bank of *England* post bills, which were sold at the Exchange at a loss of 107 *l.* 2 *s.* 8 *d.*: That the agreement for payment of the annuity in advance was made by and between *Rowley*, *E. E. Maunsell*, and *Lynch*, about a week before the said consideration money had been paid, and previous to the execution of the deed: That in consequence of the said arrangement to abandon the guarantie of Messrs. *Harmans*, and retain in lieu thereof the year's annuity, the annuity deed was altered by inserting 9,000 *l.* as the consideration for the annuity instead of 8,000 *l.*, and 1,800 *l.* as the annuity instead of 1,600 *l.*: That the four receipts for the first four gales, dated respectively the 25th *April*, 25th *July*, and 25th *October* 1821, and the 25th of *January* 1822, were drawn and signed by *Rowley* at the time the money was paid as aforesaid; but deponent, though his name was to them as if the monies were paid by him, had nothing to do with the payment thereof, the same having been deducted by *Rowley* as aforesaid: That the Respondent was residing in the county of *Cork* while these transactions took place in *Dublin*, and was not present at the payment of the consideration money, or when the deductions were made, nor during any of the negotiations relative to the said annuity: That there was no professional person present, during such negotiations, on his behalf; nor any person authorised or empowered by him, or who stated themselves to be authorised by him, to consent on his part to any such payment in advance out of said consideration money: That deponent did not, nor did any other person to deponent's knowledge, acquaint or inform the Respondent that the said deductions were to be made, nor was he informed of the terms and conditions thereof before he executed the deed of annuity, to deponent's knowledge and belief.

With regard to the advance of 1,000 *l.* in *June* or *July* 1821, this witness deposed that, in consequence of the increased rate of purchase which *E. E. Maunsell* bid for said lands, it became necessary to deposit a further sum, and there was a negotiation entered into with *Rowley*, on the part of *Lynch*, for the purpose of procuring such further loan: That deponent took part in said negotiation, and made application individually and jointly with *E. E. Maunsell* to *Rowley*, for said further loan: That said further sum was not to be

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applied to the use of *E. E. Maunsell*, but to the lodgment of said further deposit, for the benefit of *Lynch*: That deponent made such application for said money on behalf of *Lynch*, and at his request; and he, in his application to *Rowley*, stated that such further loan was for the purpose of making an increased deposit, for and on behalf of *Lynch*, and was requested by him to make such application for such further loan: That he never stated to *Rowley* that he had been authorised by the Respondent to make such application for such further sum, and no other person, to deponent's knowledge and belief, represented himself to *Rowley* to be so authorised: That deponent was in confidence of the Respondent at the time of such further application for a new loan, but did not, nor did any other person to deponent's knowledge and belief, acquaint him with any of the circumstances relating thereto prior to the 6th of *July* 1821; and he believed that the Respondent was not acquainted with the circumstances attending said new loan for several years afterwards: That *E. E. Maunsell* was employed in said negotiation solely as the solicitor for *Lynch*, and he did not act therein as solicitor for the plaintiff.

With regard to the subsequent application of the money, this witness said that the sum deposited by *E. E. Maunsell*, on foot of the purchase of the lands of *Barna*, was subsequently paid out of Court to him, upon report of a bad title to said lands: That the said sum so received was applied partly in payment of interest, and partly in payment of principal and interest due to creditors of *Lynch*, and partly in payment of costs due to *E. E. Maunsell* as his solicitor and attorney; and no part whatever of said fund was paid over to the Respondent for his use or benefit, further than that he was paid a portion thereof for interest due to him upon foot of his mortgage upon the lands of *Barna*; but otherwise than as such creditor he received no part thereof.

G. W. Rowley, examined for *Dawson* and *Hollier*, said he believed that in the years 1820 and 1821 *R. H. Maunsell* was the confidential adviser of the Respondent, and manager of his estates and property in the county of the town of *Galway*: That *George Maunsell* was receiver of his rents there, and *E. E. Maunsell* was his confidential solicitor and attorney; and witness's belief in that respect was founded on the information of *R. H.* and *E. E. Maunsell*: That in *December* 1820 deponent became acquainted with *T. Conneys*, esq., an *Irish* barrister, since deceased, on occasion of his applying to deponent to raise a sum of 8,000*l.* by way of annuity on account of, and by the authority and direction of the Respondent, and *E. E.* and *G. Maunsell*, and *M. B. Lynch*, to be

secured by the assignment of a mortgage for between 5,000 *l.* and 8,000 *l.*, then vested in the Respondent, on the estate of *Lynch*, and by a charge of the annuity on the estate itself, subject to various incumbrances then existing thereon; and also by the joint and several bond of the Respondent, and *Lynch*, and the *Maunsells*, &c.: That *Coneys* on that occasion represented himself to be the friend of those four persons, and stated the Respondent to be a gentleman of considerable property, and about purchasing the *Barna* estate, with a view of increasing his political influence in *Galway*; and that the sum of 8,000 *l.* proposed to be raised was for the purpose of enabling the Respondent to purchase the estate: That deponent, as the agent of *Dawson* and *Hollier*, entered into an agreement with *Coneys* to advance the sum of 8,000 *l.* on purchase of an annuity of 1,800 *l.* for three lives, to be secured as before mentioned: That *Dawson* and *Hollier* being informed that *Lynch* was personally embarrassed, and his estate much encumbered, and that the *Maunsells* had little property, would on no account have consented to advance the said sum had not the Respondent been represented by *Coneys* as the principal and important party in the transaction: That deponent prepared the instruments of security in *London*, and carried them and the 8,000 *l.* to *Dublin*, where, after two meetings with *R. H.* and *E. E. Maunsell*, they proposed to increase the sum to 9,000 *l.*, and the annuity to 1,800 *l.*, and to alter the securities accordingly; and deponent consenting on behalf of *Dawson* and *Hollier*, the necessary alterations were made in the deed, &c. in *Dublin* before the 25th of *January* 1821, and deponent, by the direction of *R. H.* and *E. E. Maunsell*, proceeded to *Macroom* Castle, county of *Cork*, the residence of the Respondent, for the purpose of getting the securities executed by him; and being there informed that the Respondent was in *Cork*, deponent proceeded thither, and finding the Respondent at an hotel there at 10 o'clock at night, sent up to him to his bedroom a letter from his said nephews, which, as deponent believed, informed him of all the circumstances of the increased advance, and of the securities to be executed: That the Respondent came down from his room with the said letter open in his hand, appearing to have read it, and to be in possession of all the particulars of the change in the original agreement: That deponent then produced the securities, and informed the Respondent of the nature thereof, and that deponent had only 8,000 *l.*, which he would hand to *E. E. Maunsell* on his executing the securities, and would remit to him the additional sum of 1,000 *l.* on his arrival in *London*; with all which statement the Respondent expressed himself perfectly satisfied, and then executed the

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several instruments : That deponent on the following day set off to *Dublin*, and there, on the 25th of *January*, on *E. E. Maunsell's* executing the said securities (he being the last executing party), deponent paid him on his own account and as solicitor of the Respondent, of *G. Maunsell*, and of *Lynch*, the 8,000*l.* in *English* bank-notes, without retaining or deducting any sum whatever therefrom ; and although he then delivered to *E. E. Maunsell* his bill of costs, the same was not then paid : That in a day or two after the 25th of *January*, *R. H.* and *E. E. Maunsell* of their own accord proposed to deponent to pay the year's annuity in advance, stating that it would suit the arrangements of all the parties, and that they were anxious to disencumber themselves of the payment for the year, at the expiration of which the plans of the Respondent and the other parties regarding the *Barna* estate would be completed, and the annuity would be redeemed : That the said proposal, being acceded to by deponent, was carried into effect about the 30th of *January*, when the deponent's bill of costs and the sum of 753*l.*, which, together with the 1,000*l.* which was intended to be remitted from *London*, would make up the year's annuity, less the discount allowed by him, were paid to deponent ; and deponent believed that the Respondent was consulted on that matter between the 25th and 30th of *January*.

With respect to the new agreement in *June* 1821, on the advance of the further 1,000*l.* by *Dawson* and *Hollier*, this witness deposed that the negotiation for that advance was opened with him as their agent in *May* 1821, by *E. E. Maunsell* as solicitor of the Respondent, and on behalf of himself and *G. Maunsell* and *Lynch*, first proposing to raise 16,000*l.*, out of which the annuity and all prior incumbrances on the *Barna* estate should be paid off, and a new annuity granted in consideration of that sum at 9 *per cent.* as a first charge on the estate, the title deeds to be deposited with the grantees.

The terms of the new agreement appear by the following extracts from letters, some put in evidence by one side, some by the other :—

A letter from *R. H. Maunsell* to Mr. *Rowley*, the 5th of *May* 1821 :—" Mr. *Coneys* has, I suppose, put you in possession of all the particulars relative to the *Barna* estate. At present my brother is not the highest bidder, as he was, on the last setting up, outbid ; and what may occur next term as to confirming the present sale, I know not. You are aware of the dislike Mr. *Hedges* (meaning the Respondent) has all along felt to involving himself with respect to the *Barna* estate. Unfortunately, Mr. *Coneys* by his representations, on which I relied,

induced me to obtain the sanction and concurrence of Mr. *Hedges* to the arrangement he made with you in *England*. I was induced solely to enter into that transaction from my confidence in his assurance that he had procured the further sum of 8,000 *l.* on the joint note of Mr. *Hedges* and my brothers. You are, I believe, aware that in this he failed. * * With respect to raising money at the rate of 10 *per cent.*, I think it a most ruinous transaction, yet in comparison of 20 it is certainly moderate, and under the circumstances, perhaps, reasonable; at the same time nothing but the most urgent necessity would make me advise it. Now the state of our situation is exactly this: Mr. *Hedges* is most anxious to be relieved altogether from *Barna*, and so should I, if not in some measure committed by the deed of annuity to your friends, and a feeling for the family of Mr. *Lynch*, whose situation is indeed most deplorable. Mr. *Hedges* is to meet me in *Dublin* next week, when I will fully bring before him all matters relative to *Barna*, and also your letters; if he then withdraws, there must be an end of our further interference; if he authorises our proceeding, I will immediately acquaint you; in the meantime you will confer an obligation on myself and brothers by keeping our situation in view, and perhaps some of your clients might be inclined to advance such a sum as we might want if we determine to go on with the purchase. I should suppose it might be about 14 or 15,000 *l.* * * From the present state of the money market, I should hope at 7½ or 8 *per cent.* * * Indeed, could I assure Mr. *Hedges* that the rate of the annuity would not exceed 7½, I think it might induce him to come forward once more."

Another letter from *R. H. Maunsell* to Mr. *Rowley*, the 31st of *May*:—"We have re-opened the sale, on condition of bidding 1,000 *l.* over Mr. *Dowell*, the present bidder at 30,200 *l.* * * The lands of *Barna* are to be again set up on the 25th *June* next, and it is of vital consequence that we should be prepared to make our deposit then, to accomplish which 1,500 *l.* will be necessary. I had made up my mind that we should not interfere again with *Barna*, but several circumstances have induced me to change my determination; the principal one, my reliance on you for the means to complete our purchase. * * I will now only say, that in committing ourselves and Mr. *Lynch*'s unfortunate family into your good offices, that you will make every exertion to procure the necessary sum on terms as liberal and reasonable as possible. I should think we should require about 15 or 16,000 *l.* to complete the purchase; for which, the moment we are the confirmed purchasers, an annuity shall be granted to the lenders on the estate itself as a prior charge, and the present

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annuity paid off with the money to be raised in the second instance; it would also be a most material object if the parties to the present deed of annuity would allow us to pay them off at the end of the half year. This must be an act of mercy on their part; perhaps you could make some arrangement with them either to that effect or to advance the further sum wanted, consolidating the entire as soon as we can, by being the purchasers, make them the first incumbrancers on the lands themselves. * * We rely on you every way, assured that you will, if possible, procure the sum necessary at 8 or 8½ *per cent.*; of course I mean the sum now immediately required, of 1,500 *l.*, to form part of the sum of 15 or 16,000 *l.* necessary to complete the purchase."

To that letter *E. E. Maunsell* added the following:—"We think it would be prudent, that the deed of annuity should be registered as against *Lynch*; if you could send it over to my brother, he would do the needful and return it. He has the memorial ready. Or if you send it to some correspondent here, my brother will attend him to see the necessary matters done."

A letter from *Mr. Rowley* to *R. H. Maunsell*, 2d June 1821:—"I have received a letter from *Mrs. Lynch*, in which she mentions the necessity of 1,000 *l.* being paid into Court on the opening of the sale. As I have not heard anything from you on this head, you will yourselves most probably find this sum, and deposit it for a temporary period, in which case you will be reimbursed when you raise the sum for the completion of the contract, should you become the purchaser. Until we hear the sum that will probably be required, it will, I fear, be impossible to act efficiently in the way of raising a loan. The smaller it is the more readily we can get it; and as *Mr. Coneys* mentions your power of arranging with the creditors to a considerable extent, I should conceive it would be much the most advisable way to do so. Whenever you let me know what your views are, I will endeavour to meet them, but I think, for any sum of money you require, you will be obliged to give 8½ or 9 *per cent.*, but I do not apprehend more."

A letter from *Mr. Meredith*, the partner of *E. E. Maunsell*, to *Mr. Rowley*, 14th June 1821:—"In the absence of *E. E. Maunsell*, who is now in the county of *Wexford*, I received your letter to him, and on his return he will reply fully to you respecting the loan of 16,000 *l.* As to the procuring of *Mr. Eyre's* note, I should not wish that it would be pressed for at this moment, unless the person advancing the money would insist on getting it. Major *Maunsell*, and his brother *E. E. Maunsell*, will join in the

note, which I am sure you will consider quite sufficient for the 1,500*l*. You know the person Mr. *Eyre* is, and his unwillingness to be troubled on the occasion, unless upon the certainty of his being declared the purchaser, which you are aware at this moment is uncertain. Should Mr. *Eyre* not be declared the purchaser, of course the 1,500*l*. would be returned at once, if required."

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A letter from *E. E. Maunsell* to Mr. *Rowley*, 21st June 1821:—"I have but little to add to Mr. *Meredith's* communication. And as the time is now so limited for making our deposit, should we, on *Monday* next, be declared the purchasers, we trust that the enclosed security will meet your approval, until we can for certain ascertain how we will stand with regard to the purchase of the *Barna* estate. Mr. *H. Eyre* will be in *Dublin* early next week, and should we be declared purchasers, we undertake immediately to conclude the loan you propose, at 9 *per cent.* for 16,000*l*., to which Mr. *Eyre* will be a party in like manner as in the former loan, and the 1,500*l*. now to be advanced to enable us to make the deposit, is to form part of the 16,000*l*. Should we not become the purchasers, we will, without delay, return the advance to you in the same form in which we shall receive it, adding such expenses as you may think reasonable on the transaction. Mr. *H. Eyre's* absence at *Macroom* makes it impossible for us to have any communication at the moment with him; and as our object is a personal communication with him, I am sure, from your knowledge of us, that on this occasion, you will act for us as if Mr. *H. Eyre* had been a party to the enclosed security, which my brother Major *H. Maunsell* and myself guarantee shall have his further signature if required; but should the new loan be effected, this will be rendered entirely unnecessary. If your clients would make the further advance, say 18,000*l*. at 9 *per cent.* on the entire, it being understood that the former should remain at the present rate for the 12 months ending in *January* next, it would, I should think, meet the object of all parties, and enable us to proceed effectually with the purchase."

On the same sheet, *R. H. (Major) Maunsell* added:—"My brother *Edward* has read me your letter and his answer as above, which I most fully confirm, and I hope your knowledge of us will render it satisfactory. Our reliance is on you, and I pledge myself, that in every respect, the above communication of my brother shall be ratified by Mr. *Hedges Eyre*."

A letter from *E. E. Maunsell* to Mr. *Rowley*, 25th June 1821:—"This day I was declared the purchaser of *Barna*

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for 31,250 *l.* The sum I will now want to complete the deposit, being one-fourth the purchase-money, is 7,812 *l.* 10 *s.* Of this I have 7,000 *l.* or thereabouts. I will want from you, say 900 *l.*, which will perfectly answer in place of the 1,500 *l.* for which my brother and I forwarded to you our joint security. We must now act with promptitude; may I therefore request you will forward the 900 *l.* to form part of the sum we shall now require, and to bear the same *per centage* from the day of the advance sought in the first instance."

A letter from Mr. Rowley to E. E. Maunsell, 26th June 1821:—"I received your letter yesterday, enclosing a bill of exchange for 1,500 *l.* I had made arrangements with the parties who have advanced the present money, that it should continue at 10 *per cent.* at the expiration of the present year; and it was not till yesterday that the person who was to have advanced the remainder of the money, 7,000 *l.*, disappointed me in so doing. * * * I have this day seen the parties who advanced the 9,000 *l.*, and they have at my request agreed, at the expiration of this year, to take 9 *per cent.* for their money; and this I can safely say you may be assured of; so that you will have the power of retaining that sum at that rate of interest, for as long a period as you please. I have also felt particularly desirous that you should not be disappointed about the 1,500 *l.*; and to that end, although, I assure you, greatly inconvenient, and upon my responsibility, I have succeeded in procuring 1,200 *l.*, which I will remit the end of this week."

A letter from the same to the same, 30th June 1821:—"I have received your letter, in which you mention your having become the purchaser. I am too late this day to procure the bank post bills for 1,000 *l.*, but will certainly transmit them by *Monday's* post; you speak of 900 *l.* only, but I will send 1,000 *l.* * * As I wrote to you before, the money already advanced, I can guarantie to you, may remain at 9 *per cent.*, and the 1,000 *l.* may also be added to it. The remainder of the money I certainly cannot assist you with."

A letter from R. H. and E. E. Maunsell to Rowley, 2d July 1821:—"We feel truly obliged to you for the very kind exertion and friendly services that you have made and rendered us, by procuring the further sum of 1,000 *l.*, which enabled us to make our deposit, and we have every reason to think that no further opposition will be made to the sale being confirmed to us. We agree that the money already advanced by your clients, after the expiration of the first year, shall remain another year on annuity at the rate of 9 *per cent.*, and that 1,000 *l.* now advanced shall be received on the terms stated in your letter."

A letter from Mr. *Rowley* to *E. E. Maunsell*, 3d July 1821 :—" I now beg to enclose you two bank post bills for 500 *l.* each, for the purpose of being paid into Court as additional deposit money. I wish it to be clearly understood between us that the terms upon which this 1,000 *l.* is advanced, are, that it is to be kept for 12 months, in any event, at 9 *per cent.* If you wish to retain it beyond that period, I can undertake to say you may do so at the same rate of interest, in which case it will be added to the money already advanced upon annuity, and a security given for the whole at 9 *per cent.*; such security to be a charge upon the *Barna* estate pursuant to the undertaking, and of course the title deeds to be deposited. I now therefore hold the bill of exchange for 1,500 *l.* as a security for 1,000 *l.*, and the rest of the transaction regarding this sum is upon honour, and our clients look to me for its due performance."

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A letter from *R. H. and E. E. Maunsell*, to Mr. *Rowley*, 6th July 1821 :—" We agree that the 1,000 *l.* now advanced, is to be kept for 12 months certain, at 9 *per cent.* on annuity, for the same lives as in the former deed for 9,000 *l.*, and at the expiration of the year, on the former transaction, it can be consolidated with the 9,000 *l.*, to be secured on the *Barna* estate as mentioned in your letter; the notice to make the deposit is served, and we will have it moved next week, and hope to have the sale confirmed in the course of the next fortnight; the bill for 1,500 *l.* in your hands to remain as a security till we are able to complete the entire transaction; before the next term I feel confident we will have the whole arrangements completed, as connected with the *Barna* purchase."

A letter from *R. H. Maunsell* to Mr. *Rowley*, 4th October 1823 :—" The very kind part you have taken with respect to the annuity due to your clients, now a year in arrear, has well merited my thanks, and I know not how to express the obligation I feel at your having acted the very friendly part you have on this occasion; for an application to Mr. *Eyre* would most materially injure me. At *Cork*, where I went to meet Mr. *Eyre* and Mr. *Goold*, I succeeded in arranging the loan for 2,000 *l.* that in my letter of the 4th August I mentioned. But it is not to be paid me until the 15th November. Now I assure you, the moment this sum comes into my possession, and of which there can be no disappointment, for Mr. *Hedges* is to be in *Dublin* with me at that time, to execute the security Mr. *Goold* requires, I will remit you the amount of the entire gale now due; and I hope, under existing circumstances, that you will allow me this further time."

A letter from the same to the same, 11th Nov. 1823 :—" I

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hope to leave this (*Plassey*, near *Limerick*) the day after to-morrow for *Dublin*, where the money from *Serjeant Goold* is to be paid me, and I expect no delay, as *Mr. Hedges* is to meet me there; your clients may rely on receiving the amount of the year's annuity now due with interest this month; there may be a few days delay after my arrival in perfecting the securities, but it can only be a few days; I ask no more indulgence if I fail in this, and my exertions shall be strenuously used to prevent a recurrence of the delay as in the present instance."

A letter from *Percy G. Payne* to Messrs. *Capron & Rowley*, *Dublin*, 22d Feb. 1825:—"Gentlemen, by the particular request of my friend, *Mr. Robert Hedges Eyre*, I beg leave to address you on the subject of the *Barna* estate. * * *Mr. H. Eyre* as the assignee of *Mrs. Wilkins* has the first incumbrance by mortgage, amounting to 5,848 l. 16 s. 9 d.; and your friends Messrs. *Dawson* and *Hollier* have a subsequent claim as annuity creditors, for a very valuable annuity secured thereon, and also by the bond of *Mr. H. Eyre, &c.*, but redeemable by the payment of 9,000 l.

"*Mr. H. Eyre* is now closing his 70th year, and has latterly expressed much anxiety to arrange his affairs, and to call in all monies which are due to him, and to apply them to the discharge of incumbrances affecting his own estates, and among other matters he is most anxious to get the amount of his mortgage on the *Barna* estate, and to discharge himself from all liability on account of his bond to Messrs. *Dawson* and *Hollier*; with this view, he proposes to bring to an immediate sale the *Barna* estate, so that your friends' and his demand may be thereby discharged.

"This I apprehend would be an unwelcome measure to your friends, whose annuity I understand is not only well secured but punctually paid; and it may therefore be more acceptable to them to take an assignment of *Mr. H. Eyre's* mortgage, and thereby become entitled to the first incumbrance and the legal estate in the lands, the importance of which to a puiue creditor it is scarcely necessary to dwell upon. *Mr. H. Eyre's* mortgage bears 6 per cent. interest; and what I therefore propose for the consideration of your friends, is either to advance the amount of this mortgage, and take an assignment of *Mr. H. Eyre's* rights and release him from his bond, or to choose the other alternative of being paid off the sum of 9,000 l. as the redemption of their annuity, as soon as the estate can be sold. I hope I have made my object, on the part of *Mr. H. Eyre*, intelligible. *Mr. E. Maunsell* is still his solicitor; I am merely acting, in this instance, as his friend."

A letter from *E. E. Maunsell* to *Mr. Rowley*, 4th *January* 1826 :—" I have been much disappointed at the delay that has taken place on the part of your clients, with respect to the exoneration of *Mr. Eyre*, and their taking from him an assignment of the mortgage affecting *Mr. Lynch's* estate, and which he is ready to execute on receiving the amount. May I now request your immediate attention to the carrying the above arrangement into effect, which I am satisfied would prove beneficial to your clients, and tend most essentially to the perfect security of the annuity for 900 *l.* The inability and advanced age of *Mr. H. Eyre* have determined him to bring the matter to a close, and he has been exceedingly annoyed with my brothers and me, at not having long since terminated this business, agreeable to the communications we were led to make to him on the subject. *Mr. Payne*, the barrister, his friend and legal adviser, mentioned to me he had written to you by *H. Eyre's* direction, and I hope your reply will relieve his mind from any further uneasiness, and thereby reinstate us in confidence which we feel he latterly has withdrawn, in consequence of this transaction, and which we cannot expect, until he is freed from every connexion with *Mr. Lynch's* estates."

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The cause was heard by Lord Chancellor *Plunket* the 13th and 14th of *May* 1835, and his Lordship by his judgment (b) pronounced on the 18th of *June* following, ordered and decreed that the Respondent was entitled to the relief prayed for by his bill; and declared that he executed the deed of annuity and bond only as a surety for *Lynch*; and that as it appeared to the Court that a sum of 1,800 *l.*, being the amount of the first year's annuity, was retained by *Dawson* and *Hollier*, out of the consideration money for the said deed, at the time of the execution of the deed and bond, without the knowledge or concurrence of the Respondent; and that as it further appeared that an alteration was afterwards made in the original agreement without his knowledge or concurrence, it

(b) See the report of the case by Messrs. *Lloyd & Goold*, *Cas. Temp. Lord Plunket*, p. 250.

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was further ordered and decreed that the Respondent should be discharged from all liability under the said deed of annuity and bond : And it was further ordered and decreed that the Appellant should be restrained from taking any proceedings whatsoever against the Respondent on foot of the said deed or bond, and also on foot of the judgment obtained upon the said bond in the Court of Exchequer, and from issuing any execution or levying any sum under any execution or verdict theretofore issued or obtained upon the said judgment against the Respondent : And it was further ordered and decreed that the Appellant should enter up satisfaction on the record of the said judgment, and that the decree should be without prejudice to the rights of any of the other parties to the deed of annuity : And it was further ordered that the Appellant should pay the Respondent his costs in the cause, &c.

The Appellant appealed against the whole decree.

Mr. *Knight Bruce* and Mr. *Jacob*, for the Appellant :—There are two questions to be determined in this case : first, whether the Respondent was a joint principal in the annuity deed and bond, or only a surety, together with his two nephews, for Mr. *Lynch* ? Secondly, whether, supposing him to have been a mere surety, anything was done by the grantees of the annuity, as between them and *Lynch*, the supposed principal, which had the effect of releasing the Respondent from his engagement ?

The decree declares that the Respondent was a surety only, and that he is discharged from liability under his covenant and bond. But the Appellant would submit that it sufficiently appears by the instruments themselves that the parties who granted

and secured the annuity were all principals, and no one of them was a surety for another. It appears that the contract for sale of the annuity was made by all of them; that the consideration money was paid to all, and that they all signed the receipt for it. *Lynch* alone, it is true, grants the annuity, chargeable upon, and payable out of, the *Barna* estate, with the usual powers of distress and entry, and with the usual demise to a trustee; for this obvious reason, that he alone, as the owner of the estate, could charge and demise it, and confer those powers. The other grantors could not join in that part of the deed, neither could any of them, except *Lynch*, join the Respondent in the assignment which he alone agreed to make of his mortgage. But the covenant for payment of the annuity is joint and several by the four parties, as are also the bond and warrant of attorney; and the power to repurchase is reserved to all four, or any or either of them. The only surety referred to in these instruments is Mr. *Harman*, or such other capitalist as the Respondent should procure to become surety; and his covenant to procure such surety for payment of the annuity sufficiently indicates that he himself was a principal and not a surety. Who ever heard of a surety for a surety? The four parties must be held as the principals, equally bound to pay the annuity. There is no trace in any of the instruments of the distinct characters of principal and surety being assumed by, or belonging to, any of the parties.

The reference in the articles of agreement to the event of the Respondent becoming the purchaser of the estate, shows that he had an interest in the transaction, and leaves very little doubt that the repeated biddings and purchases made by his nephews, in their own names, were really in trust for the Respondent.

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To him principally, whether he became purchaser or not, Messrs. *Dawson* and *Hollier* looked for payment of the annuity. Mr. *Rowley* swears they would not have advanced their money except on his credit. *Lynch* was overwhelmed in debt, and in gaol: the estate was deeply incumbered, and under judicial sale: several of the incumbrances were prior to the Respondent's mortgage, but he knew that the money advanced to make the deposit would be applied in discharge of the prior pressing incumbrances, so as to give him, even without purchase, full control over the estate. It was on his credit and respectability the grantees mainly relied, not deeming it necessary to inquire minutely into the dealings between him and his nephews, the other contracting parties, or into the objects or purposes any of them, or Mr. *Lynch*, had in view; it being sufficient for them to know that they had the joint security of all as principals. If, as between themselves, it was not intended that they should all be principals, there is not the slightest evidence that such intention was ever communicated, or even intimated, to Messrs. *Dawson* and *Hollier*. The only distinction recognised by them between the four individuals was that judgment on the bond was to be entered up in *Ireland* forthwith against *Lynch* and the Respondent, but not against the *Maunsells* until default of payment by the former two; and that execution on the judgment was to be stayed until the annuity should be in arrear for 40 days. The power of distress was to be exercised if any payment of the annuity should be in arrear for 21 days; the power of entry, if any payment should be in arrear for 31 days; and the trusts of the term were to be enforced if any payment should be in arrear for 40 days. That is the usual form. The exercise of those powers and

trusts would affect the Respondent as mortgagee, as much as *Lynch*, the nominal owner of the estate; and it was not until these remedies against the estate were found insufficient or exhausted, or the period for the exercise of them elapsed, that execution was to be issued on the bond. Although these distinctions are made between Mr. *Lynch* and the Respondent on one side, and the two *Maunsells* on the other (because the latter were men without any property of their own, but depending on their uncle, one being his solicitor, the other the receiver of his rents), still these also were principals, and entitled as much as *Lynch* and the Respondent to repurchase the annuity, and to call for an assignment.

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[The *Lord Chancellor*:—If *Lynch* repurchased the annuity, could he have held the securities against the mortgagee?]

Any one of the four repurchasing the annuity, and taking an assignment of the securities, might hold them against the others.

Supposing that the Respondent was only a surety for *Lynch*, the next question is whether anything has taken place between the latter and the grantees of the annuity that could operate to discharge the Respondent from his liability on those instruments. He alleges that the original contract was varied without his knowledge, and fraudulently as to him; first, by increasing the annuity from 1,600*l.* to 1,800*l.*, and by the deducting of one whole year's payment thereof from the purchase money; secondly, by the new agreement entered into by the *Maunsells* and *Rowley*, on the advance of the further 1,000*l.* in June 1821, to reduce the annuity to 810*l.* if the same was to be continued beyond the first year.

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In the first place, it is submitted that the payment of the annuity in advance, being for the benefit of the surety, could not have the effect of releasing him. Besides, that proposition originated with *Edw. Maunsell*, acting for himself, and also as the solicitor of the Respondent as well as of *Lynch*; alleging that it was for their common benefit, as the money was more than they wanted, to pay the year's annuity, minus the discount, their intention then being to redeem it at the expiration of the year. Before the Respondent executed the securities, he was informed by a letter from his nephew, delivered to him by Mr. *Rowley*, of the increase of the annuity, in consequence of the increase in the consideration money from 8,000*l.* to 9,000*l.* The instruments themselves showed these alterations of the original contract; and by them, as well as by the letter, the Respondent must have seen, what was further for his benefit, that *Rowley* had agreed to dispense with the assignment of his mortgage, and with the covenant from himself and Mr. *Harman*; and, in place of these deeds, to accept the agreement stipulating to make such assignment, and to procure the guarantie of *Harman* or some other capitalist, within 12 months, in case the annuity should be continued beyond one year. It was after his execution of those instruments that *Edw. Maunsell* proposed to Mr. *Rowley* to pay the annuity for one year in advance. There was no previous stipulation for retaining it out of the purchase money, as the Respondent alleges; nor was there any retention. The payment was quite voluntary; it left the contract for the annuity just as it was expressed in the securities. There still remained sufficient money for making the deposit in Court; and, assuming that *Lynch* was principal, and the Respondent his surety, it was surely in his favour

to be thus insured against all risk for one year, at the end of which it was then intended that the annuity would be redeemed.

The Respondent, however, charges by his bill, that if his liability as surety was not affected by those alterations in the contract in *January* 1821, he was perfectly discharged by the subsequent transactions in *June* and *July* of the same year. The biddings for the estate having been then opened again, *Edw. E. Maunsell* was again declared the purchaser at the sum of 31,250 *l.*; and then a further deposit in Court, in proportion to that increased sum, becoming necessary, a negotiation was opened between the *Maunsells*, on behalf of themselves, of the Respondent, and of *Lynch*; and Mr. *Rowley*, on behalf of *Dawson* and *Hollier*, for the advance of another 1,000 *l.* on an annuity of 90 *l.*, to be secured in the same manner as the former annuity. The first proposal then was to raise 16,000 *l.*, out of which the further deposit would be made, and the former annuity redeemed, and then a new annuity at 9 *l. per cent.* would be granted and secured by the same parties. Ultimately, however, *Dawson* and *Hollier* agreed to advance only 1,000 *l.*, which was sufficient for the additional deposit, upon this understanding, that the Respondent would complete the purchase of the estate; that the new annuity for the whole sum would be made a first charge thereon; and that the title-deeds would be deposited. Upon these terms, *Rowley*, on behalf of *Dawson* and *Hollier*, agreed to reduce the annuity of 1,800 *l.* to 810 *l.*, rather than have it redeemed at the end of the year; and that the annuity, to be granted for the 1,000 *l.* then advanced, should be at the same rate. *Rowley*, in his letter enclosing the 1,000 *l.* to *Edw. Maunsell*, says: "I wish it to be clearly understood between

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us that the terms upon which this 1,000*l.* is advanced are, that it is to be kept 12 months in any event, at 9 *per cent.* If you wish to retain it beyond that period, I can undertake to say you can do so at the same rate of interest, in which case it will be to be added to the money already advanced upon annuity, and a security given for the whole at 9 *per cent.*, such security to be a charge upon the *Barna* estate, pursuant to the undertaking; and of course the title-deeds to be deposited." The *Maunsells*, in the letter acknowledging the receipt of the money, say: "We agree that the 1,000*l.* now advanced is to be kept for 12 months certain, at 9 *per cent.*, on annuity for the same lives as in the former deed of 9,000 *l.*; and at the expiration of the year in the former transaction, it can be consolidated with the 9,000*l.* to be secured on the *Barna* estates, as mentioned in your letter. We hope to have the sale confirmed in the course of the next fortnight." This correspondence shows the terms and conditions on which the annuity of 1,800*l.* was to be reduced to 810*l.* The purchase was not completed by the Respondent, and the proposed terms, not being complied with on his part, did not become binding on *Dawson* and *Hollier*, although at their own pleasure they accepted the reduced annuity as long as it was regularly paid. There was, in fact, no new agreement to vary the executed contract; the proposed agreement was between the Respondent's solicitor and the grantees, and not between them and *Lynch*, the supposed principal, behind the Respondent's back. But, supposing this new agreement contained in the correspondence between the *Maunsells* and *Rowley*; without the Respondent's knowledge had been absolute, it could not operate to discharge the surety from his contract under seal. His

situation would thereby be changed for the better, in consequence of the remission to his principal of 11 *per cent.* on the annuity, and his remedy against the principal would in no manner be injured or suspended. *Prendergast v. Devey* (c), *Gregory v. Bessell* (d), *Eyre v. Everett* (e), *Hulme v. Coles* (f), *Gordon v. Calvert* (g), *Price v. Edmunds* (h).

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It will be material to look to the form of the pleadings in this case, and also of the decree. The bill states that the annuity is oppressive and usurious, being at the rate of 20 *per cent.* of the money advanced: That the agreement being made and concluded in *England*, was subject to all the laws and statutes applicable to such transactions then in force there, and that *Lynch* was obliged, in consequence of his embarrassments, to take the advance upon the terms proposed; and it charged that these terms were in violation of the law. But the Appellant submits that the negotiation and transactions were concluded in *Ireland*: That the securities are there situated, that the money was there paid, and was truly advanced on annuity, and there are no Annuity Acts in *Ireland* as in *England* in the least to affect the legality of the transaction. The decree does not proceed on these grounds, but still it gives the Respondent all the relief his bill prayed for, with costs, without directing any account or repayment of any part of the consideration money. The decree is wrong in form as well as in principle, particularly as it gives relief against three only of the instruments of security, leaving the articles of agreement untouched.

Mr. Serjeant *Jackson* and Mr. *Kindersley*, for the

(c) 6 Madd. 124.
(d) Id. 186.
(e) 2 Russ. 381.

(f) 2 Sim. 12.
(g) Id. 251.
(h) 10 Barn. & C. 578.

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Respondent :—This being an injunction bill, framed as all such bills are, could not properly be made to pray relief against the articles of agreement. The Appellant did not attempt to enforce any part of that agreement. It may also be admitted that the bill makes several grounds of equity, and the decree proceeds on the one ground only, namely, that the Respondent was only a surety, and that he was discharged from his liability as such by the subsequent alterations of his engagement by the other parties, without his concurrence. That ground of the decree is not affected by the failure of the other grounds alleged in the bill.

The decree declares, in the first place, that the Respondent was a mere surety. It is manifest, from all the circumstances attending the transaction, that *Lynch* alone was the principal. He had first mortgaged his estate to a Mr. *Fitzgerald*: that mortgage became ultimately vested in the Respondent, who, having himself no acquaintance with *Lynch*, yielded to the persuasions of the Messrs. *Maunsell* to come forward to save the estate to the *Lynch* family, by joining, as a collateral surety, in the deed of annuity. *Lynch*'s overwhelming embarrassments compelled him to yield to the oppressive terms of the advance, as negotiated by his friend and agent Mr. *Coneys*, in *London*, with Messrs. *Capron & Rowley* on behalf of *Dawson* and *Hollier*. The Respondent was not a party in any sense to that negotiation. Why should he, a gentleman of independent property, and not wanting ordinary prudence, raise money at 20 *per cent.*? *Lynch*'s estate was the substantial security; and to strengthen that security, the Respondent, having a mortgage on the estate, agreed to assign his mortgage, and join in the bond; and accordingly *Dawson*

and *Hollier* in their bill, filed in 1828, treated *Lynch* all through as their principal debtor, and the Respondent as a mere surety. That bill, after stating the efforts made by *Lynch* to save the estate from being sold, charged to this effect: "As further evidence of the collusion between *Lynch* and *E. E. Maunsell*, to forward the said object of *Lynch*; that in order to procure the necessary deposit upon *Maunsell's* bidding, and to save the estate from falling into the hands of *Reddington*, *Maunsell* applied to plaintiffs (*Dawson* and *Hollier*), by the direction of *Lynch*, and with the concurrence of *R. H. Eyre*, to advance a sum of money to *Lynch*, in purchase of an annuity charged on his estates, and further secured by the joint security of *R. H. Eyre*, *E. E. Maunsell*, and his brother; to which proposal the plaintiffs agreed." The bill of costs furnished by *Rowley* for preparing the securities, also showed that *Lynch* was the borrower of the money. There is no document or other evidence whatsoever to show that the lenders considered the Respondent to be the party contracting with them. The witness, *R. H. Maunsell*, in answer to the sixth interrogatory, deposed "that *E. E. Maunsell* upon the sale bid for the lands in trust for *M. B. Lynch*, who undertook to provide the means of completing the same, the said *M. B. Lynch* having been at that period negotiating the loan of the money for said purpose through his friend and agent in *London*, the late *T. Coneys*, esq., barrister at law." Such are the words of this deposition, as contained in the Respondent's appendix; but the form in which that deposition is set out in the Appellant's appendix would bear the construction that it was *E. E. Maunsell* who was negotiating the loan through his friend *Coneys*; a construction which would be inconsistent with the gen-

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ral scope of this witness's depositions, from which it is apparent that Mr. *Coneys* was not in any sense the agent of the Respondent. Mr. *Rowley*, in his answer to the 13th interrogatory, says, not that *Coneys* was the agent of the Respondent, but that *Coneys* told him he represented all the parties. In the long series of letters between *Rowley* and the *Maunsells* there appear several passages clearly showing that *Lynch's* estate was the principal subject to which the grantees looked for their security, and that they looked to the Respondent as a person liable in default of *Lynch*, but not as primarily liable. In one of these letters, dated the 5th of *January* 1827, Mr. *Rowley* writes to *E. E. Maunsell* that the amount of arrears of the annuity had then become so serious that they would admit of no further time being spent in correspondence; that he refrained from making application to the Respondent from delicacy to the *Maunsells*; and then asks, "What can your brother *George Maunsell* be doing with the rents of the estate?" (*G. Maunsell* was the receiver.) "I wish you would let me know whether there is a desire to pay off the last 1,000*l.*, &c. If the funds get up a little, I have promised Mr. *Coneys* to do my best with some of the insurance offices, to get them to advance a sum to discharge all incumbrances, and take the estate and receivership into their own hands."

The obvious and natural inference from the facts that are admitted or proved, is, that it was assumed during the negotiation for the advance that the Respondent would join in the securities, and, after the terms were adjusted, he was then prevailed upon by his nephews to become a surety, with a view to save the estate from being sold.

With respect to the form of the instruments, on

which it is contended on behalf of the Appellant that all the parties were principals, it is only necessary to observe that the deed is in the common form adopted by conveyancers, making all appear as principals. But still it is submitted that this deed bears on the face of it that *Lynch* alone was the grantor of the annuity; he alone charges the estate with it, and grants a trust term therein to secure it, and then all four covenant for the payment "of the said annuity, yearly rent, or sum," meaning payment out of *Lynch's* estate, in which the Respondent was interested to the extent of his mortgage: And *Lynch* further covenants "that he hath full power, &c. to grant and confirm the said annuity, yearly rent, or sum of 1,800*l.*, &c.: And that the said hereditaments shall continue to be charged with and subject to the said annuity, yearly rent, or sum, &c., and all costs, charges, and expenses to be occasioned by the nonpayment thereof." The agreement, of the same date with the deed, is a very important instrument to show that the Respondent was only a surety. It recites that *Lynch* "hath granted" to *Dawson* and *Hollier* an annuity of 1,800*l.* "secured upon certain estates of the said *M. B. Lynch*," and by the covenant of *Lynch* and the other three, and by their joint and several bond: And the agreement towards the conclusion is to the effect that if the Respondent should within 12 months become the purchaser of *Lynch's* estate, then that he should at his own expense charge the estate with the annuity. By that instrument prepared in *London*, *Mr. Rowley* attempted to make the Respondent in the event mentioned a principal, but the *Maunsells* and the Respondent himself insisted upon an alteration of the agreement to the effect of putting the expenses on *Mr. Lynch*; and in that alteration *Mr. Dawson* as well

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as *Lynch* concurred, as appears by their respective undertakings at the foot of the agreement. If the Respondent was only a surety, as the decree declares, there can be no doubt that the decree is perfectly right in holding him to be discharged from all liability under his covenant and bond, by the subsequent alterations of the original agreement without the consent of the Respondent. He was not informed that the whole sum of 9,000*l.* was not paid, whereas in fact only a sum of about 6,680 *l.* was paid. The reason assigned for not making that change in the agreement known to the Respondent when he executed the different instruments was, that it was an afterthought originating with the *Maunsells* saying the whole sum was not wanted. That was Mr. *Rowley's* account; but the account given by *R. H. Maunsell* of the way in which nearly one-third of the whole sum was retained for costs and payment of the annuity in advance, is far more natural; and without disparaging Mr. *Rowley* further than by saying that his recollection of a transaction which happened in 1821 failed him in 1835, his account is absolutely incredible. The truth is that there was a studied and designed concealment from the Respondent of that change in the original agreement, and the four receipts for the quarterly payments of the annuity were framed to perpetuate that concealment. He became surety in respect of an advance of 9,000 *l.*, a large part of which was not advanced at all, or if advanced, was applied to purposes injurious to the surety. He had a right to say, *non in hæc fœdera veni.*

The retention, without notice to the Respondent, of so much of the money agreed to be advanced, would alone discharge him from his liability as surety; at all events the subsequent alterations of the agreement

making in fact a new agreement without the concurrence of the Respondent, had that effect. The correspondence between the *Maunsells* and *Rowley* show the terms of that agreement, which is confirmed by the acts of the grantees accepting for several years the reduced annuity of 810*l.*; and, after that fell in arrear, by the suggestions of breaches on foot of the judgment on the bond for 900*l.* interest. They knew well that the terms of the first agreement were oppressive, and they were anxious to avoid it by a modified agreement. Courts of Equity never refuse to discharge a surety from liability under such oppressive bargains, where there is fraud or concealment. Lord *Hardwicke*, in the case of *Lawley v. Hooper* (i), says, "There has been a struggle between the Equity Courts and persons who have made it their endeavour to find out schemes to get exorbitant interest and to evade the statutes of usury, &c.; and wherever they have found the least tincture of fraud in any of these oppressive bargains, relief hath always been granted." In *Pidcock v. Bishop* (k), it was held that a secret agreement between the creditor and principal debtor was a fraud on his surety, and he was accordingly discharged from his liability. In *Stone v. Compton* (l), Chief Justice *Tindal*, giving the judgment of the Court of Common Pleas, says, "The principle to be drawn from the cases to which reference has been made in the argument, we take to be this: That if with the knowledge or assent of the creditor, any material part of the transaction between the creditor and his debtor is misrepresented to the surety, the misrepresentation being such that, but for the same having taken place, either the suretyship would not

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(i) 3 Atk. 278.

(k) 5 Dowl. & R. 505.

(l) 6 Scott, 846; 5 Bing. N. C. 142.

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have been entered into at all, or being entered into, the extent of the surety's liability might be thereby increased, the security so given is void at law on the ground of fraud." Any concealment from the surety even without fraud, or any alteration of the agreement between the creditor and debtor, or indulgence given to the debtor without the concurrence of the surety, discharges him. *Witcher v. Hall* (m), *Lord Harberton v. Bennett* (n), *Samuell v. Howarth* (o), *Rees v. Berrington* (p), *Eyre v. Bartop* (q), *Burke's* case, cited in a note to *Ex parte Gifford* (r), and by Lord *Eldon* in his judgment in *English v. Darley* (s). It has been contended that the original agreement in this case being under seal, could not be altered by the parol agreement between *Rowley* and the *Maunsells*; but the contrary has been held (t). The cases referred to for the Appellant do not sustain the position for which he contends, and they are clearly distinguishable from the circumstances of this case.

Mr. *Knight Bruce*, in reply:—The Respondent appears to be a principal on the face of all the instruments; to support his case, therefore, it was incumbent on him to prove that he was only a surety. Inferences from the supposed wealth of the Respondent, or from the correspondence between his co-grantors and the agent of the grantees of the annuity, are not to prevail against these solemn instruments.

M. B. Lynch would be the best witness of the fact in dispute in this case; Mr. *Meredith*, the partner of *E. E. Maunsell*, would be a good witness; but the

(m) 5 Barn. & C. 269.
 (n) Beatty, 386.
 (o) 3 Meriv. 272.
 (p) 2 Ves. jun. 540.

(q) 3 Madd. 221.
 (r) 6 Ves. 809.
 (s) 2 Bos. & Pull. 62.
 (t) 1 Y. & J. 434.

Respondent did not file his bill until after the death of both. Mr. *E. E. Maunsell* (now a clergyman) might have been examined, but was not. If Mr. *Rowley*'s account of the transactions is not satisfactory, further inquiry will become necessary. The Respondent had a large interest in *Lynch*'s estate at the time of the transaction, and intended to become the purchaser of the whole, having the ultimate view of increasing his political influence in *Galway*.

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The Respondent died soon after the hearing; the Appellant revived the suit in Chancery in *Ireland*, against his executors (the Hon. *W. H. White Hedges*, and the Rev. *R. Davis*); and in *March* 1842, presented a petition to the House to revive the appeal, and for leave to lodge a supplemental case. The Appeal Committee, to whom that petition was referred, directed the appeal to be revived, but was of opinion that, as the cause had been fully heard, it was not necessary to deliver a supplemental case under the standing order, No. 199 (Vol. VI. *ante*, p. 979.)

In reviving an appeal, which became abated after a full hearing, it is not necessary to lodge a supplemental case.

Lord *Cottenham*:—The facts of this case are left by the evidence in great obscurity, which, as it appears to me, occasions the only difficulty. Three questions were very properly made by Lord *Plunket*'s judgment: first, is the plaintiff (the Respondent) to be considered as a principal grantor of the annuity, or only as a surety for *Lynch*? Secondly, what was the effect of the transaction, at or about the time the deeds were executed, as to releasing the surety? Thirdly, what was the effect, for that purpose, of what took place in the month of *June* or *July* following?

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As to the first question, I think it quite clear that

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the plaintiff, as between himself and the grantees of the annuity, was a principal and not a surety. The deed recites a joint contract by *Lynch* and the plaintiff, and the two others, for payment of the annuity, which was to be secured by their joint and several bond, and a judgment against all of them; and by the covenant relating to the plaintiff's mortgage, and by a covenant by *Harman*, of which the plaintiff was to procure a renewal after the first year. It further recites that the expenses were to be paid by the four, and that the consideration money, 9,000 *l.*, had been paid to the four. It seems to have been supposed that all this was to have been superseded by the fact that *Lynch* alone granted what is described as one annuity or rentcharge of 1,800 *l.*, charged and chargeable upon and issuing out of the estate of *Barna*, with a power of entry and distress, and the grant of a term to secure the payment; but this grant does not appear to me to justify any such inference. *Lynch* alone had the estate by which the annuity was to be secured; the plaintiff had a mortgage upon it; and both accordingly make their respective interest in the property subject to securing the annuity, by the agreement of the same date as the deed. The plaintiff agreed to make his mortgage subject to securing the annuity; and in the event of his becoming the purchaser of the estate, to charge the annuity on the estate, as a primary charge. It was observed that this agreement recited that *Lynch* had granted the annuity, but in fact it only professes to recite the purport of the annuity deed, and that *Lynch* had thereby granted the annuity charged upon the estate, and it also recites the covenant and bond of the four, and the warrant of attorney by them. This is perfectly consistent with all being principals in granting

the annuity, each charging his particular interest in the estate, with the payment of it, and accordingly the covenant and bond are joint and several, and the right of redeeming the annuity after the expiration of 12 months is reserved to them, or any or either of them. The question whether the plaintiff as between himself and the grantees was a principal in the grant of the annuity, or only a surety for the payment of it by another, must be ascertained by the terms of the instruments themselves: no extraneous evidence is admissible for that purpose; and upon that question I think there is no room for doubt; the plaintiff granted, and by the contract, as evidenced by those instruments, undertook as a principal grantor for the due payment of the annuity; as between himself and the grantees, he must be considered as a principal.

But although all the grantors were principals as between them and the grantees, yet as between themselves some of them might be sureties for others; and if it was established that such was the case as between the plaintiff and *Lynch*, and that the grantees knew that such was the case, they might by their dealing with *Lynch* have raised an equity in favour of the plaintiff, entitling him to the protection of a Court of Equity against the legal consequences of the instruments he joined in executing. This distinction is perfectly well settled, and is the ground of many of the decisions. If it was necessary for the purpose of deciding this case, to come to a decision as to whether the relation of principal and surety existed between the plaintiff and *Lynch*, I should feel great difficulty (from the state in which that question is left upon the facts as they appear) in concurring in the opinion of the noble and learned Judge below upon that point. The plaintiff being upon the face

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of the instrument a principal, together with *Lynch*, the proof that as between themselves he was a surety only, would be upon him.

Before adverting to the contradictory evidence of the witnesses, or the inference to be drawn from the language of the correspondence, it will be well to ascertain how the case stands upon that part of the evidence as to which there can be no doubt. At the time of executing the deed securing the annuity, *Lynch* was owner of the estate called *Barna*, but subject to a mortgage vested in the plaintiff, and to other charges. *Lynch* was in prison for debt, and the estate had, under a decree of the Court of Exchequer, been put up for sale. *Edward Maunsell* and his brother were nephews of the plaintiff, who was a proprietor of lands near the town of *Galway*, and *Edward Maunsell* was an attorney, and as such had acted for the plaintiff. By an order of the Court of Exchequer, of the 11th of *December* 1820, *Edward Maunsell* had been declared the purchaser of the estate under the decree of foreclosure, at 28,500 *l.*, of which he had undertaken to lodge forthwith one-fourth, but which he had not done; whereupon an order of the 19th of *December* 1820 was made, setting aside a former order for a new sale upon his opening the bidding, and under which he had been declared the purchaser. It is evident, however, that the parties did not consider this last order as excluding *Edward Maunsell* from becoming the purchaser, for on the 13th of *February* 1821 he obtained an order setting aside the order of the 19th of *December*, upon his depositing 7,125 *l.*, in which case a new sale was to take place. This sum he deposited on the 14th of *February*, and was ultimately declared the purchaser at 31,250 *l.* It is certain that these biddings were not

on his own behalf, and that he never contemplated himself becoming the purchaser. The money raised by the grant of the annuity was to enable him to make this deposit ; and the question is, for whom were these biddings made, and who was to be the purchaser, the plaintiff or Mr. *Lynch* ? For beyond all doubt, as the intended purchaser was the person for whose benefit the money was raised and the annuity granted, if as between the grantors the relative situation of principal and surety existed at all, such party would be considered as the principal. The other instruments of the 25th of *January* 1821 do not appear to me to throw any light upon this question, but the agreement of that date is, I think, decisive of it.

At the date of that agreement, *Edward Maunsell* had been declared the purchaser, and, though his title as such had been suspended by the order of the 19th of *December*, the exertions to complete the sale of the annuity were to supply the means of restoring him to that position. When, therefore, that agreement speaks of the plaintiff, or any person in trust for him, as becoming purchaser of the estate, and in that event contracts to charge the annuity upon it, it must allude to the purchase intended to be completed in the person of *Edward Maunsell*. There are, indeed, evident symptoms of the *Maunsells*, nephews of this childless uncle, taking upon themselves to act in what they thought affected the property and interest of the family, as if they were owners of the property rather than as agents for the owner ; and that the uncle was slow and reluctant to follow the course they were forwarding, but that he at last put himself under ~~their~~ direction, and took upon himself the responsibility of what they had arranged, is proved by this agreement of the 25th *January* 1821. There

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are indeed letters from him printed and apparently proved, which would establish this beyond all doubt; but as I do not find them referred to in the decree, I exclude them from my consideration. There are, however, several letters from Mr. *Robert* and Mr. *Edward Maunsell*,—which were received and read in evidence, as appears from the decree, and as to the admissibility of which no objection has been raised before this House,—which prove, though not in terms so distinct, that the plaintiff was from the beginning intended to be the purchaser. In a letter of the 5th of *May*, 1821, Mr. *Robert Maunsell* says, “If he (Mr. *Hedges* the plaintiff) withdraws, there must be an end of our further interference;” and again, “could I assure Mr. *Hedges* that the rate of the annuity would not exceed 7½, I think it might induce him to come forward once more.” In another letter of the 31st *May* 1821, to Mr. *Rowley*, *Robert Maunsell* says, “We have re-opened the sale on condition of bidding 1,000 *l.* over Mr. *Dowell*, the present bidder at 30,200 *l.*” “I had made up my mind that we should not interfere again with *Barna*, but several circumstances have induced me to change my determination;—the principal one, my reliance upon you for the means to complete our purchase.” “I should think we should require about 15 or 16,000 *l.* to complete the purchase: for which, the moment we are the confirmed purchasers, an annuity shall be granted to the lenders on the estate itself as a prior charge, and the present annuity paid off with the money to be raised in the second instance.” In a letter of the 21st *June* 1821, Mr. *Edward Maunsell* says, “Mr. *H. Eyre* will be in *Dublin* early next week; and should we be declared purchasers, we undertake immediately to conclude the loan you propose

at 9 *per cent.* for 16,000 *l.*, to which Mr. *Eyre* will be a party in like manner as in the former loan; and the 1,500 *l.* now to be advanced to enable us to make the deposit, is to form part of the 16,000 *l.* (u)."

There are several other letters of the same purport, some indeed indicating an unwillingness on the part of the plaintiff to have anything to do with the estate, and a reluctance on the part of his nephews to apply to him concerning it; and these have been relied upon as proving that the plaintiff was only a surety; but they all treat him as the intended purchaser, none suggesting that Mr. *Lynch* should buy the estate; and yet Mr. *Robert Maunsell* (we have no account of the transaction from Mr. *Edward Maunsell*) is produced as a witness by the plaintiff to state "that *Edward Maunsell* acted in the sale of the lands in trust for *Lynch*, having been at such period negotiating the loan of the money for the said purpose through his friend and agent in *London*, the late *T. Coneys*, esq.;" and that "*Edward Maunsell* did not bid for the said lands for his own use and benefit, but he acted under the direction and forwarded the views of the said *M. B. Lynch* in relation thereto." Mr. *Rowley* however, who negotiated in *London* on behalf of the lenders of the money with Mr. *Coneys*, says that the lenders of the money would on no account have consented to advance the money, "had not the plaintiff been represented by Mr. *Coneys* as the principal and important party in the transaction (x)."

It is to be regretted that Mr. *Robert Maunsell* was not examined as to the agreement of the 25th of *January* 1821, to which he was a party, as well as the plaintiff, and to his own letters of the 5th and 31st of

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(u) See the letters, *supra*, p. 22 to p. 27.

(x) See the evidence of *R. Maunsell* and *Rowley*, *ante*, p. 15 to p. 20.

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May 1821, and asked to reconcile his depositions with the contents of those documents. Fortunately, however, the documents are themselves in evidence; and relying upon them in preference to what that gentleman has sworn in favour of his uncle, the plaintiff in a suit the object of which was to relieve him from the contract he had entered into, I have come to the conclusion,—with no other doubt than what necessarily arises from the Lord Chancellor of *Ireland* having been of a contrary opinion,—that the plaintiff was a principal as between himself and the grantees of the annuity; that he was intended to be the purchaser, and that the money was raised for the purpose of making the deposit upon a purchase made for him, and under which, if completed, he would have been the owner of the estate; and that consequently, as between himself and the grantees, he was not only not a surety, but the principal.

How far the relative situation of the parties was varied by subsequent transactions is immaterial; the question depending upon what was their relative situation in *January* and *June* 1821. The application therefore of that part of the consideration money for the annuity, which was deposited on account of the purchase, after the plan of purchasing the estate was abandoned, upon a report of no good title, in *February* 1822, can have no bearing upon this question, except so far as it may aid inferences arising from the earlier transactions. It was of course returned to *Edward Maunsell*, in whose name it had been deposited. *Robert Maunsell*, in answer to the 12th interrogatory, says that it was applied in payment of principal and interest due to creditors of Mr. *Lynch*. If those creditors were prior incumbrancers upon the estate, of which the plaintiff was a mortgagee, as Mr. *Rowley*

says was the case, it would not have been an useless application of the plaintiff's money. The *Maunsells* having failed in placing the plaintiff in the situation of a purchaser and owner of the estate, may have thought that the next best thing would be to extend his charge upon it. Lord *Plunket* is represented as saying that it had been admitted on the part of the defendant, that if the plaintiff had paid off the 9,000 *l.* and the arrears of the annuity, and redeemed and taken an assignment, he would have been entitled to levy the annuity from *Lynch*, and that *Lynch* would not have been so entitled as against him (*y*). This would have been no test by which to try the question in dispute, but is the same question in another form. If the 9,000 *l.* had been applied for the benefit of *Lynch*, the consequence would have been as stated, but not if the 9,000 *l.* had been applied for the benefit of the plaintiff; and the proposition might have been therefore true at one time and not at another. If the money had been originally applied for the benefit of the plaintiff, in making the deposit for his purchase, but afterwards, upon the purchase being abandoned, applied for the benefit of *Lynch*, by paying debts not charged upon the estate, the supposed right of the plaintiff would arise only upon this latter application of the money.

The judgment of the Court below proceeded entirely upon the ground that the plaintiff was throughout the whole transaction a surety only. If, therefore, the ground fails, the decree cannot be supported: I am, however, anxious to explain my view of the state of the law upon the subject; assuming that the plaintiff was only a surety from the beginning, that is, as be-

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(*y*) Lloyd & G., Cas. Temp. Lord *Plunket*, p. 274.

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tween himself and the co-grantors of the annuity ; for as between him and the grantees, I think it quite clear that he was a principal grantor. To affect the grantees in that case with any equities arising from the plaintiff being only a surety, they must have had notice of it at the date of the transaction. If the instruments gave them no such notice, I do not find any evidence bringing home to them knowledge of the fact. Mr. *Rowley* states that the plaintiff was represented as the principal and important party; and Mr. *Robert Maunsell* does not state that any explanation was made to Mr. *Rowley*, informing him that the plaintiff was only a surety. If, therefore, when Mr. *Rowley*, acting for the grantees of the annuity in *January* 1821, entered into the arrangement in question with *Edward* and *Robert Maunsell*, who represented all the grantors, supposing that the plaintiff was, as the instruments represented him to be, a principal in the transaction, the grantees cannot be affected by any circumstances not communicated, which might give to the plaintiff, as between himself and any of the co-grantors, the character of a surety; and the same observation applies to the arrangement of *June* 1821.

Let it, however, be supposed that the plaintiff was only a surety, and that the grantees, or their agent, knew it, the surety cannot be discharged by any arrangement with the principal, of which he is informed and approves, or which he permitted the opposite party to conclude upon the supposition that the surety approved. The bill alleges that the original arrangement was for an annuity of 1,800*l.*, for a consideration of 9,000*l.* This the plaintiff's witness, *Robert Maunsell*, proves to be false; for he states that the original arrangement was for an annuity of 1,600*l.*, for a consideration of 8,000*l.*; and that 1,000*l.* was

added to the purchase money, and 200 *l.* to the annuity, because Mr. *Rowley* insisted upon retaining the first year's annuity; the grantors having failed to procure the guarantie of Messrs. *Harman*, as had been proposed. This alteration, he says, took place before the execution of the deed or payment of the 8,000 *l.*, and that the deed and other instruments were altered accordingly. The deed and instruments so altered, were executed by the plaintiff, which brings home to him the knowledge of the fact that the purchase money had been increased from 8,000 *l.* to 9,000 *l.*, and the annuity from 1,600 *l.* to 1,800 *l.* Is it a reasonable supposition that he executed these instruments for effecting this altered arrangement, without inquiring the reason of the alteration? Or that his nephew and solicitor misrepresented it to him? Or that Mr. *Rowley*, who procured the execution of these instruments by him (and who, acting for the grantees, was interested in making the plaintiff acquainted with the true history of the transaction), joined the nephew and solicitor of the plaintiff in misstating it to him? This is not a case in which any such speculations can be admitted. If there was any ground for them, the plaintiff, seeking to be relieved from his engagements, must prove the fact upon which he seeks such relief. His witness has, in my opinion, negatived the case attempted to be made for him.

Mr. *Rowley* gives a different account of this part of the transaction, and says that the suggestion as to retaining the first year's annuity out of the purchase money was not made until some time after the execution of the deeds. There must, I think, be some inaccuracy in this statement. Why was the sum to be paid raised from 8,000 *l.* to 9,000 *l.*, if it was not to meet the deduction of the first year's annuity?

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The plaintiff, however, did not read Mr. *Rowley's* evidence, but relied upon that of *Robert Maunsell*. Had he made Mr. *Rowley's* depositions part of his case, he could not have discredited that part of his evidence which states that the proposition was made by *Robert* and *Edward Maunsell*, on behalf of the plaintiff, whose sanction and approbation they stated they had obtained. But independently of this proof of the personal knowledge of the plaintiff, it is proved that the alteration in the arrangement relied upon as a ground of discharging him from his contract, was arranged and agreed upon by his two nephews, both of whom acted for him, and one of whom was his attorney; and of the arrangement so made, the plaintiff did not complain for more than ten years. The alteration in the arrangement as to the annuity, which took place in *June* or *July* 1821, was in like manner effected by the nephews, agent and attorney of the plaintiff. That they also acted for others, cannot invalidate the effect of their dealing upon the interests of the plaintiff; for that one was the authorised agent of the plaintiff, and the other his attorney in the whole of this transaction, is beyond a doubt; and accordingly, after this arrangement was made, and, by virtue of it, the annuity reduced from 1,800*l.* to 900*l.*, that is to say, 810*l.* reduced annuity, and 9 *per cent.* upon the additional 1,000*l.*; and which reduced annuity continued to be paid for several years, partly, as *Rowley* states, out of money belonging to the plaintiff, in which he is strongly confirmed by *Robert Maunsell's* letter of the 11th *November* 1823; or, as the plaintiff alleges, but does not prove, out of the proceeds of the estate of an insolvent mortgagor, *Lynch*, of which he, the plaintiff, was mortgagee; all which the plaintiff pretends was without his know-

ledge, although, in 1827, proceedings at law were taken against him for the reduced annuity, which were renewed in 1831; but he never applied to any Court of Equity for relief, until after the latter proceedings had been commenced; that is to say, in *November* 1831. The plaintiff, indeed, does not, by his bill, state when he became acquainted with this new arrangement, but says merely that he was in no manner privy to or concerned in it; and his witness, *Robert Maunsell*, only says that the plaintiff, as he believes, was not acquainted with the circumstances for several years afterwards; but he also says that he made the application to Mr. *Rowley*, on behalf of Mr. *Lynch* by name; a statement disproved by Mr. *Rowley*, and by his own letters, in evidence, of the 5th and 31st of *May*, and the 2d of *July* 1821, and Mr. *Edward Maunsell's* letters of the 21st and 25th *June* 1821. Mr. *Rowley* deposes distinctly that the application which led to the arrangement in *June* or *July* 1821, was made by *Edward* and *Robert Maunsell* on behalf of the plaintiff and the other grantors, and that *Edward Maunsell* stated that the plaintiff concurred in it; and, indeed, it could not be otherwise, for it was part of the arrangement that the annuity should be the first charge upon the estate, to which the plaintiff alone, as mortgagee, could give effect. If, therefore, *Robert Maunsell's* deposition be true, that this agreement was made without the knowledge of the plaintiff, he must have been guilty of a gross fraud upon the parties with whom he was dealing. It appears to me, therefore, that there is no reasonable ground for believing, and certainly none for judicially assuming, that the plaintiff was, in the language of the bill, in no manner privy to or concerned in the alteration of the agreement, in *June* or *July* 1821;

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but, on the contrary, it must, I think, be judicially assumed that it was concluded on his behalf by his authorised agents, and with his approbation and concurrence; and that he is therefore bound by it, whether he were principal or surety in the original contract.

It is also to be observed that the bill does not state what took place in *June* 1821, as an alteration of the terms of the original contract with the principal, by which the surety was in equity discharged; but as a release altogether of the annuity, and the substitution of a new contract, by which the 9,000*l.* advanced was to be considered after the expiration of the year as a loan at 9*l. per cent.* interest; and charges that it was therefore void as usurious. For this there is not the slightest pretence. The plaintiff gave no evidence in support of this statement, except the letters which disprove it; but Mr. *Rowley* and the correspondence prove that the reducing the amount of the annuity from 1,800*l.* to 810*l.* was the only effect of the arrangement so far as it related to the annuity, for which the plaintiff was liable; so far as it related to the advance of an additional sum of money, it has no reference to the subject-matter of this suit. The proposition, it appears, from the nephews and agents of the plaintiff, was for the purpose of preventing the redemption of the annuity on the expiration of the first year. If, therefore, the plaintiff had been only a surety, and the evidence as to the transaction of *June* or *July* 1821 had disclosed a case for his discharge, the question would have arisen whether he could have any relief for that purpose under this record. The only part of the transaction which could have been relied upon as affecting the situation of a surety, is the stipulation to be found in the letters of the 30th

of *June* 1821, and the 2d, 3d, and 6th of *July* 1821, that the reduced annuity should not be redeemed until after the expiration of the second year; but this forms no part of the case made by the bill.

Lord *Eldon*'s observations in *Ex parte Gifford* (z), and in *Samuell v. Howarth* (a), must be understood with reference to the cases before him; they afford no inference that that very learned Judge would have held that a surety was discharged because the principal had agreed with his creditor that only half the debt should be claimed, or only a portion of the annuity paid for the future. The surety will be left to judge for himself between his original undertaking and another substituted for it; but that is not the case where the contract remains the same, though part of the subject-matter is withdrawn from its operation. In *Witcher v. Hall* (b), Mr. Justice *Littledale* puts the case of a surety for the rent of a tenant who was to hold 100 acres, but by a subsequent agreement with his landlord held only 50; and thinks it clear that the surety would be liable. Modern cases, such as *Hulme v. Coles* (c), and *Price v. Edmunds* (d), have put a very rational limit to the rule that giving time to the principal discharges the surety, by holding that for that purpose such giving time must be under circumstances which might at best be injurious to the surety. The latter case also establishes that a conditional agreement for time does not discharge the surety, when from the condition not being performed the agreement does not become binding; and in the present case it was a condition of the alteration of the arrangement that the reduced annuity should be a

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(z) 6 Ves. 806.

(a) 3 Meriv. 278.

(b) 5 Barn. & C. 281.

(c) 2 Sim. 12.

(d) 10 Barn. & C. 578.

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primary charge upon the estate, and that the title-deeds should be deposited ; which condition was never performed. It is true that payment of the annuity at the reduced rate was nevertheless accepted, which it has been said was a waiver of the condition ; but the contract to discharge a surety must be positive and distinct ; and if the acceptance of the reduced annuity by the grantees was a waiver of the condition, the payment of it was conclusive evidence of the plaintiff's acquiescence in the arrangement under which the reduction had taken place.

Having the misfortune to differ from the judgment pronounced by Lord *Plunket*, who seems to have bestowed the utmost attention upon the case, I have been anxious fully to explain the grounds upon which my opinion has been formed. I have not been able to satisfy myself that the plaintiff has established any case to be relieved from the contract which he entered into, and I therefore think that his bill ought to have been dismissed with costs. I propose to your Lordships, therefore, to reverse the decree appealed from ; and in its place to substitute an order dismissing the bill, with costs of the suit in the Court below.

(It was ordered accordingly, that the decree complained of be reversed ; and that the plaintiff's bill in the Court below be dismissed, with costs of suit there.)

SARAH HAWORTH - - - - - *Appellant.*

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June 13.

FANNY BOSTOCK and Others - - - - - *Respondents.*

DECREE dismissing a bill for arrears of an annuity, on the ground of presumed satisfaction and lapse of time; varied by directing the bill to be retained for 12 months, the plaintiff to be at liberty to establish her claim in an action at law.

*Annuity,
Arrears of.*

THE bill in this case was filed in the Court of Exchequer in Equity, in 1833, by the Appellant, widow of *John Haworth*, who died in 1831, against his personal representatives and devisees, claiming 30 years' arrears of an annuity settled on her for her separate maintenance, by a deed of separation dated *April 1797*; and payment of the annuity for the future. The bill alleged payment of the annuity up to 1803, and that frequent applications for further payments were made to the husband from that year up to 1826, and that he as frequently, during that period, admitted the annuity to be subsisting.

The defence mainly relied on was a presumption of redemption of the annuity in 1803, by payment of a sum of money, according to a proviso contained in the separation deed; and also lapse of time.

Mr. Baron *Alderson*, concluding that the annuity had been redeemed, dismissed the bill, with costs.

(The case is reported by Messrs. *Younge & Collyer*, Vol. iv. p. 1.)

Mr. *Pemberton* and Mr. *Girdlestone* were heard in support of the appeal against that decree. (Their

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arguments did not materially differ from the argument on the same side in the Court below.)

Mr. *G. Richards* and Mr. *Koe* were partly heard for the Respondent.—

The Lords stopped them, expressing their Lordships' opinion to be, that the Appellant's claim was a mere legal demand against the assets of the testator, her husband ; and that all that a Court of Equity could do, in the first instance, was to remove impediments against any action she might be advised to bring to establish her claim ; and that, for that purpose, she might use the name of her trustee, or, as he was dead, of his personal representative.

It was accordingly ordered, that the decree be varied, and that the bill be retained for 12 months from the date of this judgment ; with liberty in the meantime, to the Appellant, to bring an action at law, in the name of the personal representative of the trustee in the deed of separation (who died in 1805), against the Respondent *Fanny Bostock* ; and that she should not set up the Act of the 3 & 4 *Will.* 4, c. 27, in bar of the action (*a*).

(*a*) The action has been brought, but not yet tried.

SIR JOHN SIMPSON, Knight, and } *Plaintiffs in Error.* 1842:
Others - - - - - } June 15, 16.

JOHN FRANCIS, LORD HOWDEN - *Defendant in Error.*

AN agreement, under seal, between Lord *H.* and the Plaintiffs in Error, recited that a company had been formed for making a railway; that the Plaintiffs in Error were shareholders; that a bill had been introduced into Parliament, according to which the line would pass through Lord *H.*'s estates and near his mansion, and that he opposed the passing of the bill; that the Plaintiffs in Error had proposed that, if he would withdraw his opposition, and assent to the railway, they would endeavour to deviate the proposed line; and Lord *H.* agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent; and the Plaintiffs in Error covenanted that in case the said bill should be passed in the then session, they would, in six months after it received the Royal assent, pay Lord *H.* 5,000 *l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line; exclusive of, and without prejudice to, further compensation in the event of the deviated line not being ultimately adopted.

Agreement.
Fraud.

Lord *H.*, in consequence of these stipulations, withdrew his opposition; the bill passed in that session; and after six months had elapsed, his Lordship brought his action in debt for the 5,000 *l.*, alleging in his declaration the facts above stated; to which the Plaintiffs in Error pleaded that the railway, at the time of the agreement, and according to the Act, was intended to pass through lands of divers individuals, and the agreement was made secretly without their knowledge, and was concealed from them until the Act passed, and was concealed from the Legislature during the passing of the Act; and that Lord *H.* was a Peer of Parliament.—

Held (affirming the judgment of the Court of Exchequer Chamber), that the agreement was valid, inasmuch as Lord *H.*, though a Peer, had a right to bargain in his individual character for compensation for injury to his property; and it was not shown on the record that the money was promised as a consideration for his vote being given or withheld; or that the parties to the agreement intended to conceal it from the individual landholders on the line, or from the Legislature; or that any fraud was intended or committed on any party.

THIS was a writ of error upon a judgment of the Court of Exchequer Chamber, which reversed a judg-

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ment of the Court of Queen's Bench in an action of debt for 5,000 *l.*, brought by the Defendant in Error against the Plaintiffs in Error, in *February* 1837.

The declaration, consisting of one count, stated that by an agreement, under seal, made between the Defendant in Error, of the one part, and the Plaintiffs in Error, of the other part, dated the 4th of *May* 1836, —reciting that a company, called “The *York* and North Midland Railway Company,” of which the Plaintiffs in Error were four proprietors, had been formed to make a railway from the city of *York* to *Altofts*, in the county of *York*; that a bill had been introduced into Parliament for making the said railway; and the line thereof, according to such bill and the map or plan deposited for the purposes thereof, would, for a considerable extent, pass through the estates and near the mansion of the Defendant in Error; and that, as he considered the same would be a great injury to his estates, he was therefore a dissentient from such undertaking, and would oppose the passing of the said bill: and further reciting, that the Plaintiffs in Error, in their individual capacities, and not merely as proprietors in the said railway, had proposed to the Defendant in Error, that if he would withdraw his opposition to the bill, and assent to the said railway, they would endeavour to deviate the line proposed in the map or plan deposited for the purposes of the said bill, in the manner in the said agreement mentioned; and that, in case the said bill then in Parliament passed into a law in the then present session, then the defendants should be bound by the further stipulations and agreements in the said agreement after contained;—the Defendant in Error did agree that, on condition of those further stipulations and agreements being performed, he did by the said agreement withdraw his opposition to the

said bill, and give his assent thereto ; and the said Plaintiffs in Error did by the said agreement covenant with the Defendant in Error, that, in case the said bill then in Parliament passed into a law within the then present session of Parliament, they, or the said company, within six calendar months after the Act for constructing the said railway according to the line proposed in the said then present bill and the map or plan so deposited as aforesaid, should in the then present session of Parliament receive the Royal assent, pay unto the Defendant in Error 5,000 *l.* towards compensation for the damage and detriment which his residence and estates would sustain from the said railway passing according to such deviated line, and exclusive of and without prejudice to the further compensation to be made to the Defendant in Error in the event of such deviated line not being ultimately adopted, and without prejudice to such further compensation to him or to his tenants, for any such damage and injury as thereafter mentioned (a).

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(a) The further stipulations in the agreement, not set forth in the declaration, were, that in case the said bill then in Parliament should in the then session be passed for making the said railway according to the then Parliamentary plan thereof, then the Plaintiffs in Error, or the said company, should and would, in the then next session of Parliament, apply for and use their best endeavours to obtain an Act for deviating the line, as proposed in the plan drawn in the margin of the agreement : And in case such amended Act could not be obtained during the then next session, or the following session, that the Plaintiffs in Error should within three calendar months after the passing of such amended Act in the then next or following session, or in the event of such amended Act not being obtained, then within three months after the attempt to obtain it should have failed, pay the Defendant in Error such additional sum over and above the said sum of 5,000 *l.*, by way of compensation for the damage and detriment which his said residence and estates would sustain from the railway passing otherwise than according to the said proposed deviated line, as should be fixed by the reference or umpirage in the agreement mentioned, exclusive of and without prejudice to the further compensation to be made to him and his tenants, for any damage and injury as in the agreement after expressed ; And that the Plaintiffs in Error, or the

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The declaration then averred, that the Defendant in Error, in pursuance of the said agreement, withdrew his opposition to the said bill; that the bill passed during the then session of Parliament, and received the Royal assent more than six calendar months before the action commenced, but that the Plaintiffs in Error had neglected and refused to pay the said sum of 5,000*l*.

To this declaration the Plaintiffs in Error (having craved and had oyer of the said agreement) pleaded two pleas:—

First, that the said company, after making the agreement, abandoned the said deviated line, and in lieu thereof adopted another line for their railway, which entirely missed the lands of the Defendant in Error; and that they had petitioned Parliament to be permitted to carry their railway along the newly adopted line, and were making every exertion to obtain an Act for that purpose; and that, if they succeeded, the railway would not pass through any part of the lands of the Defendant in Error.

Secondly, that the projected railway in the agreement mentioned, at the time of making the agreement, and according to the said Act to which the Royal

said company, previously to using any part of the lands of the Defendant in Error for the purposes of the said railway, should pay to him after the rate of 100 *l*. per acre, for all his land which might be required for the purposes of the railway, or the works thereof; and that they should, on demand, fully compensate him and his tenants for any damage done to them in the progress of the works by the constructing of the railway, such compensation to be fixed by reference or umpirage as therein mentioned: And that all costs of the said references should be borne by the Plaintiffs in Error, or the company: And the agreement contained various other stipulations, restrictions, and provisoes, in favour of the Defendant in Error, for the protection of his estates in the construction of the railway; and also a proviso that, in case the said bill should not pass into a law during the then present session of Parliament, the said agreement, and every clause therein contained, should be void.

assent was given, as in the declaration mentioned, was intended to pass through divers lands of divers individuals; and that the agreement was entered into privately and secretly between the parties thereto, and without the consent or knowledge of the said individuals, and was concealed from them until the Act was passed; and that the agreement was not disclosed to the Parliament by which the said Act was passed, but was concealed from the Legislature during the passing of that Act: And further, that the Defendant in Error, at the time of making the agreement, was a Peer of the Realm and of Parliament.

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To those pleas the Defendant in Error demurred specially. The Plaintiffs in Error having joined in demurrer, the case came on for argument in the Court of Queen's Bench in *November* 1838; and that Court, in *January* 1839, gave judgment for the Defendant in Error on the first plea, and for the Plaintiffs in Error on the second (*b*). The Defendant in Error having then brought a writ of error to the Court of Exchequer Chamber on the judgment, on the second plea, that Court reversed that judgment (*c*).

The present writ of error on the judgment of reversal, on the second plea, came to be argued in the presence of the Judges (*d*).

The *Solicitor-general* and Mr. *Pemberton* (Mr. *J. Addison* was with them):—The question turns on the legality of the agreement. The case of the Plaintiffs

(*b*) 10 Adol. & E. 800.

(*c*) Id. 815.

(*d*) The law Lords present were, the Lord Chancellor, Lords *Brougham* and *Campbell*. The Judges were, Lord Chief Justice *Tindal*, Justices *Patteson*, *Williams*, *Coleridge*, *Coltman*, *Wightman*, and *Cresswell*; Barons *Parke*, *Alderson*, *Rolfe*, and *Maule*. The Judges who concurred in the judgments of the Courts below are mentioned in the report, 10 Adol. & E. 798 to 808.

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in Error is, that the agreement was a fraud on the Legislature and on the other landowners on the line of the projected railway. In the first place, the agreement being for a different line from the then Parliamentary line, and being secretly entered into and kept concealed from Parliament, was a fraud on the Legislature, contrary to public policy, and therefore void. Secondly, such a secret and concealed agreement for a deviated line was void, as being a fraud on the other landowners through whose lands the railway, according to the then Parliamentary line was intended to pass, and who had assented to the undertaking on the faith of the Parliamentary line being the line really intended. Thirdly, the agreement was a fraud upon the other subscribers to the railway mentioned in the bill then before Parliament, without whose privity or consent the agreement was entered into: And fourthly, it was apparent on the face of the agreement that the 5,000*l.* were to be paid in order to induce the Defendant in Error to withdraw his opposition, and give his assent to the bill then in Parliament; and the Defendant in Error being then a Peer of Parliament, the agreement had an evident tendency to influence his judgment and vote in the passing of the bill, and on that ground the agreement was unconstitutional and void.

(The learned counsel stated the course of litigation in the cause :—After the action was commenced in the Court of Queen's Bench (in *February* 1837), the defendants thereto filed a bill (in *March* 1837) in the Court of Chancery for an injunction to stop that action, and for having the agreement delivered up to be cancelled, as being void for the reasons above stated. A demurrer was put in to that bill by Lord *Howden*; and the Master of the Rolls, after hearing the argument on the demurrer, was of opinion that the agreement was

illegal, and his Lordship overruled the demurrer (*e*). There was then an appeal from that decision to the Lord Chancellor, who in his judgment abstained from giving any opinion on the validity of the agreement, but on other grounds restored the demurrer (*f*), which put an end to the equity suit. The pleas to the declaration were afterwards (in *November* 1838) argued in the Court of Queen's Bench, and the judgment of that Court was given on the first plea for the Defendant in Error, and on the second against him; the Judges there concurring in the opinion before indicated by Lord *Langdale*, that the agreement was a fraud on the Legislature, and therefore void (*g*). The judgment of the Court of Queen's Bench, on the second plea, was brought to be reviewed in the Exchequer Chamber, and was reversed (*h*).—The arguments and judgments referred to are so fully reported on the question of the validity of the agreement, that we deem it unnecessary to report the arguments on the present occasion. The only new authority cited in reference to that question was a judgment by Lord *Eldon*, given in Messrs. *Mylne & Keen's* report of the case of *Blakemore v. The Glamorganshire Canal Company*, Vol. 1, p. 162 *et seq.*; and the only new argument was a comparison of the agreement in question with fraudulent marriage bonds, and with deeds of composition with creditors, by which some would have benefits in fraud of others.)

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Mr. *Bethell*, in the absence of Mr. *F. Kelly*, for the Defendant in Error, submitted that in no case was fraud to be inferred; and here, unless it appeared on the face of the instrument, the House would not strain a point

(*e*) 1 Keen, 583.

(*f*) 3 Myl. & C. 97.

(*g*) 10 Adol. & E. 800.

(*h*) *Id.* 815.

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to presume fraud. The agreement upon which the action was brought was perfectly legal upon the face of it, and there was no legal obligation on the Defendant in Error to give notice of the agreement, either to the other persons through whose lands the railway was intended to pass, or to the Parliament by which the Act was passed. There was no attempt or intention by this agreement to deceive any person. What the parties agreed to as between themselves, with respect to the deviation in the line of railway by another cut, was for the public benefit as well as for their own, and was to be submitted to the consideration of Parliament. The question brought before the House in this case is not affected by the opinion of Lord *Langdale*, whose decision was confined to the matter of the demurrer before him ; and if there was any indication of opinion by his Lordship as to the legality of the agreement, it was outweighed by the indication of opinion by Lord *Cottenham* to the contrary.

As the counsel for the Defendant in Error were about to resume their argument next day,—

June 16.

The *Lord Chancellor* said :— We have consulted the learned Judges with respect to the pleadings in this case, and they are unanimously of opinion that the question of fraud is not raised in any way upon those pleadings. There is no averment upon the face of the plea, that there was any intention, at the time when the agreement was entered into, that it should be kept concealed ; and there is nothing upon the face of the agreement itself, the terms of the agreement, from which we can infer that such was the intention. We are therefore of opinion, as far as this question at least is concerned, that the judgment of the Court of Exchequer Chamber must be affirmed.

Lord *Brougham* :—I entirely agree with my noble and learned friend. I see no fraud whatever alleged on these pleadings.

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Lord *Campbell* :—I also entirely agree in the opinions expressed by my noble and learned friends. It appears to me that the question is not raised. If it were raised, I certainly should feel considerable difficulty upon it, after the doubts which have been entertained by persons of the greatest authority, upon this subject: at the same time, I must own that I have a very strong opinion that there is nothing in these pleadings, showing that Lord *Howden* was by this agreement positively bound to do any act which would, in the slightest degree, vary the rights of any of the parties as they were fixed by the bill which was passed, and which had received the Royal assent. Those rights must remain as they were until an application was made for another bill, and until the Legislature had passed another bill altering the provisions of the first bill. It must be presumed that justice would be done to all parties, and the agreement amounts only to this, that there would be an application made to Parliament to vary the first bill. I cannot apprehend that any circumstance of that kind could at all render illegal the agreement which the parties entered into; but it is not necessary to give my positive opinion upon that question. I concur in the opinion which has been expressed, and unanimously expressed, by the Queen's Judges, that when the pleadings are properly understood it is clear that the judgment of the Court below has been right, and that it must be affirmed.

Lord *Brougham* :—When I stated my opinion on

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the question of fraud, I looked, and I advisedly looked, into the question, beyond that which appeared upon the record. I entirely agree with my noble and learned friends, that the question is upon the pleadings; we are disposing of the case upon the pleadings. The point of fraud is not raised upon the second plea, nor does the fraudulent concealment suggested appear upon the memorandum of the agreement set forth on the oyer introductory of the pleas: it is upon that ground your Lordships will be called upon to dispose of this writ of error. I would add, however, to that, that I concur in what has fallen from my noble and learned friend, though that is not now the matter for your Lordships' consideration; and I do it advisedly, and upon this ground, that unhappily one of the parties to this agreement, Lord *Howden*, is no more; and I feel that it is just towards his memory that he should have the benefit of, not the doubt, but the expressed opinion, which I have formed upon that subject. I move that the judgment be affirmed.

Mr. *Kelly*, on behalf of the Defendant in Error, asked for costs, and for interest from the time of the judgment of the Exchequer Chamber, under the statute.

(It was ordered and adjudged that the judgment of the Court of Exchequer Chamber be affirmed with costs, and with interest at 4 *per cent.* on the 5,000*l.* from the date of the judgment of the Court of Exchequer Chamber (*i*).)

(*i*) See *Garland v. Carlisle*, Vol. V. *ante*, p. 254.

WILLIAM BROADHURST and Others - *Appellants.*

1842:
June 21.

JOSEPH TUNNICLIFF and Others - - *Respondents.*

THE House will not hear an appeal against any order or decree of the Court of Chancery that is not inrolled, if the objection is taken. And if the appeal be against a stale order or decree, time to inrol it will not be granted unless the merits appear to be with the Appellant.

Practice.
Inrolment.

THE original bill in this case was filed in 1820, for specific performance of a contract to purchase certain hereditaments in the town of *Macclesfield* in *Cheshire*. The cause came to be finally heard before the Vice-Chancellor, on exceptions to the Master's report of title, and on further directions, in *January* 1828; when his Honor ordered the bill to be dismissed with costs. An appeal against that decree was heard by Lord Chancellor *Brougham* in 1831; and his Lordship, by a decree dated the 19th of *July* in that year, affirmed the Vice-Chancellor's decree with costs. The present appeal was against both these decrees.

Mr. *Pemberton* and Mr. *G. Richards*, with whom was Mr. *Koe*, for the Appellants, had opened their case and almost concluded their argument;—

Mr. *Bethell*, with whom was Mr. *Bacon*, for the Respondents, objected to the further hearing, inasmuch as the decrees complained of were not inrolled. They relied on the recent decision of the House in the case of *Andrewes v. Walton* (a).

The Lords present held the objection to be fatal to

(a) Vol. VIII. *ante*, p. 157; and see *Brooke v. Champenowne*, Vol. IV. *ante*, p. 247.

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the appeal; and considering that the decrees were above 10 years old and no merits disclosed, their Lordships refused to indulge the Appellants with any time to enrol them, and dismissed the appeal with costs.

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June 21.

The REV. THOMAS SHERBURNE - - *Appellant.*

JOHN FRANCIS MIDDLETON and Others - *Respondents.*

*Appeal;
no Party
appearing.
Costs.*

WHERE no party appears when an appeal is called on for hearing, it will be dismissed for want of prosecution, without costs on either side.

THIS was an appeal against orders made by Lord Abinger, C. B., in the Court of Exchequer in Equity (see *Middleton v. Sherburne*, 4 Younge & Collyer, 358). No counsel or agent appeared for the Appellant or Respondents when the appeal was called on.

It was ordered that the appeal be dismissed for want of prosecution (a). Costs were not ordered to either party (b).

(a) We were informed that the parties had compromised their differences, but omitted to withdraw the appeal.

(b) See the cases of *Gardiner v. Simmons*, Vol. I. *ante*, p. 35; *Ricketts v. Lewis*, Vol. II. *ante*, p. 100; *Fraser v. Gordon*, Vol. III. *ante*, p. 718; *Hamilton v. Littlejohn*, Vol. IV. *ante*, p. 20; and *Scanlan v. Usher*, Vol. VIII. *ante*, p. 561.

HENRY MURPHY - - - - - *Appellant.*

1842:
June 21.

ROSAMOND CONWAY, Widow - - *Respondent.*

WHERE no person appeared on the part of an Appellant, when his appeal was called on, and the agent only of the Respondent appeared, alleging that he had retained counsel, and praying that the appeal be dismissed with costs, it was dismissed with costs.

*Appeal;
the Appellant
not
appearing.
Costs.*

THIS was an appeal against a decretal order of the Court of Chancery in *Ireland*, dated the 6th of *June* 1840. When the appeal was called on in due order, the Appellant did not appear, nor any person on his behalf. The agent for the Respondent appeared, and said he had retained counsel for the argument at the bar (though no counsel was then attending), and prayed that the appeal be dismissed with costs.

It was accordingly ordered that the appeal be dismissed, and that the Appellant do pay the Respondent the costs incurred in respect of the appeal (*a*).

(*a*) See the last preceding case, and the cases mentioned in the note (*b*); and also *Godson v. Hall*, Vol. VII. *ante*, p. 549.

1842:
June 23.

EYRE COOTE, Esq., an Infant, by Wil- }
liam Curry, Esq., his Guardian } *Appellant.*

The Hon. WILLIAM LE POER TRENCH, }
The Right Hon. The EARL and COUN- } *Respondents.*
TESS of MILLTOWN, and Others }

*Real
and Personal
Estates.
Legacies and
Interest.
Allocation of
Fund.
Pleading;
form of Suit.*

A SUIT was instituted in the Court of Chancery in *Ireland*, by the trustees of A.'s will, for carrying the trusts thereof into execution, and for administration of his estate; and B., one of the defendants thereto, and who was entitled to the residue of A.'s estate, having died before decree, bills of revivor and supplement and amendment were filed by the plaintiffs in the original suit, against B.'s personal representatives and against all the parties interested under his will in his real and personal estates; and a decree was made directing accounts to be taken of the personal estates, debts, and legacies, of A. and of B. respectively. By a subsequent decree, affirmed by the House of Lords, certain unpaid legacies of B., and the interest on them, were declared, in the event of his personal estate being found insufficient, to be charged on his real estates; the principal not to be raised until after the death of C., the tenant for life thereof under B.'s will, but the interest to be paid out of the rents and profits during C.'s life. On a question subsequently arising between C. and D., the tenant in tail of the real estates after C.'s life estate, whether a fund in Court, part of B.'s personal estate, should be applied exclusively in payment of arrears of interest on the legacies, or rateably in payment of the legacies and of the interest; the Master of the Rolls and Lord Chancellor of *Ireland* made orders directing the fund to be applied exclusively in payment of the arrears of interest; and the Lord Chancellor refused to direct an inquiry as to how much of the fund in Court was principal, and how much accumulated interest.—

HELD, on appeal against these orders, that any question as to the application of B.'s personal estate could not be regularly adjudicated in this form of suit, between the co-defendants C. and D.; and the orders appealed from were affirmed, with a variation and declaration that they should be without prejudice to any question between C. and D. as to the manner in which the principal and interest of the legacies should be paid.

THIS was an appeal from orders of the Court of Chancery in *Ireland*. The original bill in the cause was

filed in the year 1825, by the first-named Respondent and another (since deceased), as trustees of the will of *Charles Henry*, Lord *Castlecoote*, against his son and heir at law, and personal representative, *Eyre Tilson*, Lord *Castlecoote*, and several others, for carrying the trusts of the will into execution, and for the usual accounts and administration of his estate. In 1827, before any decree was made, the said *Eyre Tilson*, Lord *Castlecoote*, died without issue, having made his will, and thereby devised his real estates to Lady *Castlecoote*, his widow, now the Countess of *Milltown* (one of the Respondents), for her life. A bill of revivor and supplement was then filed against her and *Eyre Coote*, the heir at law (since deceased), and the personal representatives of *Eyre Tilson*, Lord *Castlecoote*, and against a great number of legatees named in his will. That bill prayed (among other things), that the said *Eyre Tilson*, Lord *Castlecoote*, might be declared to have made his election to take under the will of his father, and that the several persons deriving interests under the will of the son might be decreed to give effect to all the provisions contained in the will of his father; and in the event of its being found expedient to the due execution of the trusts of the father's will that the trusts of the son's will should also be carried into execution under the directions of the Court, that for that purpose, all necessary accounts of the son's real and personal estates, and of his debts and legacies, might be directed to be taken, and that the rights of all parties entitled under his will might be ascertained, and that his estate and effects, real and personal, might be applied in due course of administration, in pursuance of the directions of his will.

In November 1828, after the marriage of Lady

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Castlecoote with the Earl of *Milltown*, *Le Poer Trench*, the surviving trustee, and plaintiff in the original cause, amended his bill of revivor and supplement, by making the said Earl, and the trustees of the marriage settlement, parties defendants. By several orders and decrees afterwards made, the various declarations and accounts prayed by both bills were made and directed; and pursuant thereto the Master reported, among other things, that the personal estate of *Eyre Tilson*, Lord *Castlecoote*, consisted of the residue of the personal estate of his father (which was very considerable, but not then fully ascertained), and that the debts and legacies payable out of the personal estate of the son amounted to the sum of 31,239 *l.* Before that report was confirmed, *Eyre Coote*, the heir at law of *Eyre Tilson*, Lord *Castlecoote*, died, leaving the Appellant his only son and heir at law; who, under the will of the last-named Lord, was the first tenant in tail of his real estates, after the life estate of Lady *Milltown*. Thereupon the said trustee and sole plaintiff filed a bill of revivor and supplement against the Appellant and other persons, praying revivor of the suit and proceedings; and that it might be referred to the Master to inquire and report whether it would be for the benefit of the Appellant (he being an infant) that the accounts and proceedings taken in the cause should stand, and be decreed binding on him. The Appellant having answered the bill by his guardian, *ad litem*, an inquiry was directed as prayed; and the Master reported that the accounts already taken should be adopted, and that it was not for the benefit of the infant that they should be taken again.

The cause was heard, on further directions, on the 17th of *June* 1835, when a decree was made by Lord

Chancellor *Plunket*, declaring, among other things, that the balances of certain legacies, bequeathed by the will of *Eyre Tilson*, Lord *Castlecoote*, and for payment of which his personal estate was not sufficient, were well charged upon his real estates devised by his will, but not to be raised thereout until after the death of Lady *Milltown*; and that the interest of the said unpaid legacies was well charged on the said devised estates, and should be paid out of the rents and profits thereof during the life of Lady *Milltown*.

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The wills of both the Lords *Castlecoote*, and the proceedings in the cause up to this decree, and the decree itself, are fully stated in the report (Vol. IV. *ante*, p. 276 to 291) of the appeal of Lord and Lady *Milltown* against so much of that decree as directed that the interest of the unpaid legacies should be paid, during Lady *Milltown's* life, out of the rents and profits of the lands devised to her for life. The present Appellant was a principal party Respondent to that appeal, which this House dismissed, without costs, and affirmed the decree.

In pursuance of that decree, the Master made a report, dated the 6th of *February* 1836, and thereby ascertained the several sums due to the several creditors and legatees of the two testators, for principal and interest; and allocated to them, in payment thereof, the several sums mentioned in the report, so far as the same extended in payment; and by divers orders, dated respectively the 24th of *February* and 5th of *December* 1836, the 29th of *April* 1837, the 2d of *May* 1838, and by subsequent orders, the said creditors and some of the legatees received payments of principal and interest, according to the Master's allocation. All the debts and legacies of *Charles*

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Henry, Lord Castlecoote, were then paid out of his personal estate, the residue of which, by his will, became part of the personal estate of *Eyre Tilson, Lord Castlecoote*, out of which his debts also, and such of his legacies as were entitled to priority, were fully paid; but to his other legatees, not entitled to any priority among themselves, large sums remained due for principal and interest, amounting altogether to 24,135*l.*, while the personal estate then applicable to the payment thereof was only 3,303*l.*

The Master, in pursuance of an order dated the 9th of *May* 1839, made a report on the 18th of *June* 1840; and therein stated, "that inasmuch as the said sum of 3,303*l.* was insufficient for payment of the sums so due for principal and interest, it had been insisted before him, by counsel for the defendant, *Eyre Coote* (the Appellant), that according to the true construction of the decree of the 17th of *June* 1835, the said sum of 3,303*l.* should be applied rateably, in payment of principal and interest of the several sums set forth in the third part of the first schedule to the report, having no priority in relation to each other: and that, on the other hand, it had been insisted by the counsel of the parties to whom the said sums were reported due, as well as by the solicitors of the defendants, the Earl and Countess of *Milltown*, that according to the true construction of the said decree, the whole of the said sum of 3,303*l.* should be applied exclusively in payment of the interest due upon the said principal sums, instead of being applied rateably, in payment of principal and interest: but which was the true construction of the said decree in that respect, the Master had not taken on himself to decide. But he had, in the fourth schedule to his report, allocated the said sum of

3,303*l.* proportionately, amongst the several parties specified in the third part of the said first schedule, according to the amount of the sums respectively due to them, in liquidation of interest, so far as the same would extend, in case the Court should be of opinion that such was the true construction of the said decree: and he had, in the fifth schedule to his report, allocated the said sum of 3,303*l.* rateably, in payment of principal and interest, in case the Court should be of opinion, that according to the true construction of the said decree, the said sum was applicable to the payment, as well of the principal as of the interest of the said demands." And the Master set forth, in the fourth and fifth schedules to his report, the amount of the several sums then due to the said parties respectively, the sums thus allocated to them in discharge thereof, and the balances remaining due; for payment of which he found that there was not any fund then applicable.

The Master of the Rolls (in *Ireland*) made an order dated the 29th of *June* 1840, whereby, among other things, his Honor decided, with reference to the special point in the said report, "that, having regard to the terms of the decree, the sum of 3,303*l.*, found by the report to be distributable among the legatees whose demands are equal in point of priority, ought to be distributed according to the allocation thereof made by the fourth schedule to the report, and not as contended for by the counsel of *Eyre Coote*, a minor."

From that part of his Honor's order, Mr. *Eyre Coote* appealed to the Lord Chancellor (of *Ireland*), and asked that the same might be reversed, and that it might be declared that the said sum of 3,303*l.* should be distributed among the said legatees accord-

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ing to the allocation thereof made in the fifth schedule to the said report; or that it might be referred to the Master to ascertain how much of the personal estate of *Eyre Tilson*, Lord *Castlecoote*, already allocated or to be allocated, consisted of principal, and how much of interest accumulated thereon; and that the said sum of 3,303*l.* might be applied in such manner as that the real estates devised by *Eyre Tilson*, Lord *Castlecoote*, might not be burdened with a greater proportion of the principal of the legacies than they should bear, according to the true construction of his will and the decree of the 17th of *June* 1835.

The Lord Chancellor refused that application, but without costs; and by an order dated the 5th of *December* 1840, affirmed the order of the Master of the Rolls.

From both orders Mr. *Eyre Coote* now appealed to this House. Lord and Lady *Milltown* were the only Respondents who put in answers to the appeal; which, therefore, came on to be heard *ex parte* as against the other numerous Respondents.

Mr. *Tinney* and Mr. *I. P. Cory*, for the Appellant:—The effect of the order of the Master of the Rolls, directing the 3,303*l.* to be wholly applied in reduction of the interest due upon the legacies, is to give an undue benefit to the tenant for life, at the expense of the remainder-man. There is no doubt that that fund is composed partly of principal and partly of interest, though the proportion of one to the other has not been ascertained. The motion before the Lord Chancellor had for its object to ascertain that fact, by means of an inquiry before the Master. The Lord Chancellor admitted

the difficulty of the case by affirming the order, without costs.

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The order of the Master of the Rolls,—supposing it is not erroneous in principle,—ought to have been declared to have been without prejudice to any question between the Appellant and Lady *Milltown*, or ought to have reserved all questions between them as incapable of being adjudicated on in this suit. It ought also to have given directions, as the Lord Chancellor was asked to give, for ascertaining how much of the 3,303*l.* consisted of capital, and how much of accumulated income in the shape of interest. The order in its present form, appears to have the effect of deciding, against the Appellant, the question between him and Lord and Lady *Milltown*. Provision ought to have been made by this order for immediate payment by them, of interest on the unpaid legacies, in order to secure the capital (the real estate) found properly applicable to the payment of the principal sums.

The principle of the decree of the 17th of *June* 1835, was this: that, so far as the legatees were concerned, their legacies were charged on the real estate; but the real estate being subdivided into different estates, the interest upon the legacies was to be kept down by the tenant for life, the legacies themselves not to be raised until after her death; and the decree proceeded to direct the Master to allocate the personal estates of the two Lords *Castlecoote* amongst the parties entitled, “according to the rights as thereby declared.” By that expression was intended “*all* the rights as thereby declared;” and consequently the application of the 3,303*l.* in reduction of interest only, is inconsistent with that decree, which directs that the interest upon so much of the

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legacies as the personal estate should be insufficient to pay, should be paid by the tenant for life, out of the rents of the real estate.

This is not like the case of creditors, who, when there is a deficient fund for payment of debts which carry interest, are entitled to have the fund applied first in reduction of the interest; the reason being that, if the principal debt was first discharged, a debt consisting of interest would be left, which would not bear interest. Here no such accumulation of interest as a dead fund would be left; for the interest is regularly, as it accrues, to be paid out of the real estate. Some of the legacies are given to legatees for life, with remainder to their children; and supposing there was no fund for their payment but personal estate, the amount of interest directed to be paid is so large that the whole fund would be swept away in payment of that interest, and nothing would be left for the ultimate payment of the principal sums. The corpus of a fund for legacies must not be employed in payment of the interest upon them. All the legacies were by law payable at the expiration of a year from the testator's decease, so far as there was personal estate for that purpose; and to that extent the legatees are entitled to be paid their legacies, and ought not to be compelled to wait for them until Lady *Milltown's* decease. Where abatement in any case is necessary, there is no rule which prevents the Court from doing justice to all parties interested in the apportionment of the fund. The Appellant's interests, as remainder-man, are injuriously affected by the proposed apportionment, which gives the whole benefit to the tenant for life.

[Lord *Cottenham*:—Suppose the whole of the 3,303*l.* were accumulated interest?]

In that case we admit the orders appealed from

would be correct. But it is not ascertained whether the fund is capital or interest. It ought to have been referred back to the Master to review his report, and further inquiries ought to have been directed in order to ascertain how much of this fund consists of capital and how much of interest, and what part of the principal of the legacies was payable out of the personalty, and to ascertain the balance of the principal sum charged upon the real estate of the testator, and how much was due to the legatees or executors in respect thereof; and proper declarations and directions ought to have been made and given for doing justice in respect of the legacies and their interest, between Lord and Lady *Milltown* and the Appellant, and for preventing the estate of the latter from being burdened with what the former ought to bear.

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[Lord *Cottenham* :—But are you entitled to an inquiry of what the fund consists, as between the legatees and the estate, when there is another method of settling that between the tenant for life and the remainder-man ?]

There is outstanding personal estate yet remaining, and as that is got in from time to time, orders will be obtained for the application of it in payment of interests, if the order already made for that purpose is to be considered consistent with the decree of 1835. Then it is apprehended that the Appellant will be without remedy : the tenant for life may die, and in that event all the legacies must be raised out of the real estate ; and if the remainder-man shall then complain that the personal estate was not applied in payment of them, he will be told it was deficient, and, under the orders of the Court of Chancery, was wholly applied in payment of interest. If, in the opinion of the House, the decree justifies the course taken in the

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Court below, we should ask that this appeal may stand over in order that it may be extended, and the form of the decree altered, according to the principles laid down in it.

[*Lord Cottenham* :—As I read the decree of *June 1835*, it leaves the personal estate to be administered according to the ordinary course of administration.]

If that be the meaning of the decree, then the subsequent orders of the Master of the Rolls and Lord Chancellor are inconsistent with it; and we ask that those orders may be reversed or varied, and that it may be referred back to the Master to ascertain the circumstances relating to the personal funds, to see whether they ought not to be applied in relief of the real estate.

Mr. Pemberton and *Mr. Purvis*, for Lord and Lady *Milltown* :—The order complained of was made on an interlocutory application to appropriate a fund to the payment of sums which were found by the Master's report to be due; and the only question for argument here is, whether the order ought to have been made without a declaration that it should be without prejudice to the rights of other parties. The constitution of the suit rendered it impossible to adjudicate in it upon the respective rights of the infant and of Lady *Milltown*. The plaintiffs in the suit were trustees of funds for the payment of an annuity under the first Lord *Castlecoote's* will; and various claims being made on his estate, a suit was instituted by them, and a decree obtained, under which the accounts of that estate were taken, and nothing remained to be done in that suit but to hand over the surplus funds to *Eyre Tilson*, Lord *Castlecoote*. On his death his representatives were brought before the Court by

bill of revivor and supplement, and a decree made for carrying his will also into effect, with which the plaintiffs had no concern. The orders which have been made are consistent with the decree, and with what will have to be done as between the infant and Lady *Milltown*, but which cannot be done in this suit; in which, being a suit for the administration of the estate of *Charles Henry*, Lord *Castlecoote*, an account has also been taken, quite inconsistently with the practice in the *English Courts*, of the estate of *Eyre Tilson*, Lord *Castlecoote*.

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It is said to be a hardship on the Appellant that Lady *Milltown* should not pay all the interest; but the fault is with those who represent the infant—

[Lord *Cottenham*:—There is one difficulty in that view of the case; because the order adjudicates between the defendants, the tenant for life, and remainder-man. It directs that the fund should not be disposed of as contended for by *Eyre Coote*; whereas neither *Eyre Coote* nor Lady *Milltown* had anything to do with it.]

What is asked on the other side could never be worked out in this suit. It is not sufficient to ascertain what portion of *Eyre Tilson*, Lord *Castlecoote*'s estate was principal and what interest. It is impossible to adjudicate upon the equities arising out of the administration of his estate, until issue is joined between *Eyre Coote* and Lady *Milltown*, between whom the real estate is divided, and the whole accounts of the personal estate taken. Until a bill is filed by the Appellant, he cannot obtain a receiver of the real estate.

Mr. *Tinney*, in reply:—A decree has been made which is irregular, but which affects the rights of all parties, and which has been acquiesced in by all. So

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long since as 1833, an order was made referring it to the Master to inquire as to the estates of both the Lords *Castlecoote*; and the Master reported, and a decree was made upon the footing of the report; so that what the other side contend cannot be done has already been done in this suit, and has been adopted by this House.

Lord *Cottenham*:—I see no direction in the decree for continuing the accounts of the personal estate against the personal representatives of *Eyre Tilson*, Lord *Castlecoote*; and the rights of the Appellant and Respondent can never be settled until those accounts are taken. You cannot get a receiver appointed as between co-defendants, even in *Ireland*. If these rights cannot be worked out in this suit, the House cannot sanction an irregularity; and if the House has already adopted an irregular course, that furnishes the strongest reason for not pursuing it further.

The Lord Chancellor:—What you (to Mr. *Tinney*) ask would be irregular; and the danger you apprehend would be sufficiently guarded against by an order affirming the orders of the Court below, without prejudice. All you are entitled to here is a declaration that the order is not to prejudice the question as to the rights between the tenant for life and the remainder-man.

Lord *Cottenham*:—I think this alteration (of the order of the 29th of *June* 1840) will meet the justice of the case, viz.: "And his Honor did declare, with reference to the special point in the report bearing date the 18th day of *June* 1840." Then leave out the words "having regard to the terms of the decree,"

and retain these, "the sum of 3,303 *l.*, found by the report, &c., should be paid to the legatees." Then leave out the words at the end, "and not as contended for by *Eyre Coote*, a minor;" and substitute these words, "without prejudice to any question between the tenant for life and the remainder-man, as to the manner in which the principal and interest of such legacies should be paid."

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The *Lord Chancellor* (in answer to Mr. *Tinney*):— There will be no costs. The variation is, that the order be without prejudice to any question between the tenant for life and the party entitled in remainder to the real estate, as to the manner in which those legacies ought ultimately to be paid.

Lord *Cottenham* repeated that the alteration to be made in the order was to leave out the words "having regard to the terms of the decree;" and also to leave out the words "and not as contended for by the counsel for *Eyre Coote*, a minor;" and at the end of the paragraph to introduce these words, "without prejudice to any question between the tenant for life and the parties interested in the estate subject to the life estate, and as to the manner in which the principal and interest of the legacies ought ultimately to be paid."

(The order of the Master of the Rolls, and the order affirming it, were accordingly varied, without costs to either party.)

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The Rev. HENRY COLLISON, Clerk - *Appellant*.

The Rev. WILLIAM CURLING, Clerk, } *Respondents*.
and Others - - - - - }

*Will;
Construction.
Legacy of
Stock.*

A TESTATOR bequeathed to trustees a sum of 15,000 *l.* in the 3 *per cent.* consols, to be deemed a legacy of quantity and to be due at his death as if the same were a specific legacy; and he directed that, if he should not die possessed of 3 *per cent.* consols sufficient to satisfy the said sum, his executors should, within two months after his decease, purchase so much consols as should make up the deficiency or full amount thereof, as the case might require: and he created a term in his real estates, one trust of which was to raise the full amount or deficiency of the said sum of consols, in case he should not have at his decease a sufficient sum in that fund to answer the legacy. The will was dated in 1832; the testator died in 1835, having only 3,000 *l.* 3 *per cent.* consols, which had been purchased in 1834: he had in 1824 sold out 12,000 *l.* consols, which then stood in his name, and paid the produce to his brother, upon mortgage of freehold estates, subject to redemption by retransferring or replacing, on request, 12,000 *l.* consols, into the name of the testator or his executors, and on payment of interest equal to the dividends, until replaced.—

HELD (affirming the Vice-Chancellor's and Lord Chancellor's decrees) that the 12,000 *l.* consols secured by the mortgage to be replaced, were well bequeathed to make up the legacy of 15,000 *l.* 3 *per cent.* consols.

THE question in this appeal was, whether a sum of 12,000 *l.*, 3 *per cent.* consols, which a testator was entitled, under a mortgage security, at the times of making his will and of his death, to have transferred to him, was applicable to the payment of a legacy of 15,000 *l.*, 3 *per cent.* consols, given by his will to trustees on certain trusts therein mentioned. The will and mortgage deed are stated, together with the Lord Chancellor's judgment, declaring that the said 12,000 *l.* passed by the bequest, in 4 *Mylne & Craig*, p. 63.

From that judgment and decree the residuary legatee brought this appeal.

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Mr. *Bethell* and Mr. *Wray*, for the Appellant:—
By this will stock legacies are given, not as specific legacies, but as legacies of quantity, and the personal estate is not charged with the payment of them, unless it answer a particular description; the real estates being charged in case the testator should not die possessed of sufficient stock of a certain denomination. The question therefore is, whether the testator, in respect of his right under the mortgage deed, can be considered to have been “possessed” of the sum of 12,000 *l.* of that stock at the time of his death. The decree has put a construction on the will, and so has proceeded upon a basis, which is at variance with established principles; all that was necessary being an inquiry, independently of the will, as to the fact whether the testator died possessed of a sufficient sum of 3 *per cent.* consols to answer the legacy of 15,000 *l.* 3 *per cent.* consols.

In construing a will, the primary and natural signification of the words employed by the testator is to be adopted, and the construction is not to be arrived at by means of an inquiry into circumstances extrinsic to it. When a testator speaks of his being possessed of stock, he uses plain and familiar language, by which he obviously means stock standing in his own name, or, which is the only exception, in the name of his trustee. There is nothing in this will to justify any interpretation of its language other than the ordinary signification; and it was admitted by the Judges below that the word “possessed,” in its ordinary acceptance, was not satisfied by the existence of the mortgage. The utmost latitude of interpretation

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that word will admit of is, that the possession of a trustee would satisfy it. The rule of construction is, that words must be taken in their primary sense, unless the instrument itself warrants in some way a departure from it. Here, without any such warrant, the primary meaning has been abandoned, and the will has been interpreted by the result of an inquiry into the state of the testator's assets at the several dates of his will and of his death.

It was said in the Court below that lending does not change the property in the thing lent; and that the testator held a contract under which he was entitled, at any time, to require the transfer into his name of 12,000*l.* stock. As mortgagee he might have filed a bill to have the stock transferred, but his proper remedy was by foreclosure; and it is impossible, in strict accuracy and in a legal and technical sense, to say that a party, who has lent stock upon terms giving an option to the borrower either to retransfer stock or suffer his estate to be foreclosed, has a right to have such stock transferred. Undoubtedly, in equity, a party is held to have the thing he is entitled to under a written contract; but to make that principle applicable to the present case, it must be shown that the effect of this contract is to give the mortgagee the right to a transfer of stock; his right being to enforce the remedy of foreclosure given him by the contract, in the event of the mortgagor failing to perform it. The judgment of the Court below commences with an hypothesis of intention, and all the reasoning proceeds upon a reference to the state of circumstances at the date of the will; whereas the will makes no reference to the mortgage then existing; on the contrary, the language of the will is prospective, and speaks of the funded property of which the testator should be pos-

sessed at the time of his death. Yet it has been decided that these expressions were used by him with reference to the period when he made his will.

[Lord *Cottenham*:—Where a testator had given all his property to one person, and all his mortgaged property to another, and he had been a mortgagee in possession, evidence was admitted to show whether he had treated the mortgaged property, of which he had been in possession, as his own. The ambiguity in a will does not arise until the state of the property is known.]

In that case reference was directly made in the will to extrinsic circumstances; and in the interpretation of a will, regard may be had to extrinsic circumstances in two cases, viz. either in order to understand the language of the will and enable the Court to place itself in the situation of the testator, or to comprehend the description of external objects. Cases may be cited which show the anxiety of the Courts to adhere to the rule of construction which excludes the consideration of extrinsic circumstances in instances where it might have been supposed they would have departed from it; *Doe d. Oxenden v. Chichester* (a), *Pocock v. The Bishop of Lincoln* (b). In *Jones v. Tucker* (c) an inquiry as to the personal property of the testator at the date of the will, with a view to aid the construction, was refused; so also in *Jones v. Curry* (d), and *Andrews v. Lemon* (e). The Courts always adhere to the strict and proper sense of words, unless laid under the necessity of departing from it. Here the words “possessed” and “have,” are in themselves unam-

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(a) 3 Taunt. 147; 4 Dow, 65.

(b) 3 Brod. & B. 27.

(c) 2 Meriv. 533.

(d) 1 Swanst. 66.

(e) Cited in 4 Dow, 90.

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biguous technical terms, and there is no other language in the will to justify putting any secondary or popular interpretation upon them.

There is another view in which the question may be regarded. The judgment has declared that the testator was possessed of 15,000 *l.* consols at his death; and by consequence, that his real estate is not charged with the legacy. Supposing, then, that the mortgaged estate had not been worth a shilling, the legatees would have taken nothing. The Court is bound to go to that extent; because having declared, upon its view of the testator's intention, that the mortgage security was to be regarded as so much stock standing in the testator's name, it has made the legacy dependent on the sufficiency of the mortgage contract.

The decision in this case goes farther in the adoption of equivalent circumstances as a means of satisfying the testator's intention than any case has hitherto gone. In construing a will, the grammatical meaning is first to be regarded: and if, upon looking to the circumstances which existed at the testator's death, it is found that a sensible construction cannot in that way be attributed to the will, the Court is then at liberty to look out of the will to extrinsic circumstances, in order to ascertain, and give effect to, the testator's intention, and prevent an intestacy. The trusts of this bequest are peculiar, being designed to make immediate provision for the testator's sister for life to her separate use, and her children afterwards; with a direction to raise the requisite amount of stock, if the testator should not die possessed of it, within two months after his decease. It is not a case in which the testator gives so much stock without saying more; but he contemplates the possibility of his not

being possessed of the stock, and provides for that contingency. That the law wholly shuts out evidence where a grammatical meaning can be attributed to a will, appears from *Rose v. Bartlett* (*f*), approved by Lord Eldon in *Thompson v. Lady Lawley* (*g*).

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[The *Lord Chancellor*:—A man lends so much stock ; you say he no longer has it, and it will not pass by his will. If it were a chattel lent by one party to another, as a horse or a table, to be returned in specie, you would have no doubt that it passed by the will under such circumstances as the present.]

An estate contracted to be purchased is not considered in equity as the estate of the purchaser, unless he can enforce the contract. The present contract moreover is to transfer stock “upon request,” and there is no evidence of a request having been made ; yet a bill could not have been filed seeking a transfer, without a request first made.

The mortgagor is only under a moral obligation to transfer, which no one can enforce against him ; and yet a bequest like the present is held capable of being satisfied by this contract. The testator lived only three years after the date of the will, which was not long enough for the completing the investments he had commenced making in the 3 *per cents.* for the purpose of answering this legacy. The cases of *Banks v. Sladen* (*h*), and *Sheffield v. The Earl of Coventry* (*i*), demonstrate with great clearness, that in dealing with bequests of stock, the Court will not regard the state of circumstances at the date of the will, but only that which exists at the death of the testator.

Mr. *G. Richards* and Mr. *J. Parker*, for the Re-

(*f*) Cro. Car. 292.

(*g*) 2 Bos. & P. 303.

(*h*) 1 Russ. & M. 216.

(*i*) 2 Russ. & M. 317.

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pondents :—The case has been argued for the Appellant on two fallacies : one that extrinsic evidence has been admitted in order to put a construction on the will ; and the other, that certain words in the will have been interpreted in a secondary or popular, and not in their primary sense. The evidence in question has only been used to show the state of circumstances to which the will was to be applied upon the testator's decease ; and if the Appellant considers that any part of it ought to have been excluded as applying to a different period, he should have appealed from the order of reference of 1837, in obedience to which the Master reported.

With regard to the language of the will, if a testator gives a house or a horse, inquiry as to the gift must be made beyond the will ; not to ascertain what the testator meant by the language he has used, but for the application of it. If a testator bequeaths all his furniture to A., there must be an inquiry of what his furniture consists, part of it perhaps being in his mansion-house, and part lent to some one ; but if lent, the testator would be said to be possessed of it, and it would pass under the bequest. It is a fallacy to limit stock possessed by the testator, to stock standing in his name, or in that of his trustee ; and the admission that it would pass if in the name of the latter, is altogether destructive of the whole proposition, although it is attempted to evade that difficulty by saying, that in that case the testator would have power over it *de jure*. Then apply the language of the will to the actual circumstances of the case : to the recital in the mortgage deed ; the fact of its being a loan of 12,000*l.* consols, and a contract to “ replace ” that sum of stock, and not to repay an equivalent in money ; that the character of

stock, which originally belonged to it, was never altered; the dividends, and not interest, being all along paid upon it, just as if it were still standing in the lender's name at the Bank: and having regard to these facts, it is impossible not to see that the testator meant and referred to that very sum of stock in his will. It is said that we pass by the primary meaning of the word "possessed," and use it in a secondary sense; but "possessed" is a flexible term, and the lender or purchaser of a chattel is properly said to be possessed of it; he is not possessed of it as being in any particular house or drawer, but as that to which he is entitled, or of which he has contracted for the purchase. The argument on the other side would make the rights of the individual depend upon the possibility of a breach of contract by the party whose duty it is to perform it. So if a testator gives *A.* all the stock of which he is possessed, and he has a contract for stock, the stock contracted for will pass to *A.* Words which primarily would only pass freehold property, will pass leaseholds if used in a sense intended to comprehend them; *Hobson v. Blackburn* (*k*), *Atcherley v. Vernon* (*l*). In *Noel v. Hoy* (*m*), it was unsuccessfully contended that the term "possessed" was inapplicable to copyholds. Here the testator mentions the legacy several times: he first gives a sum of 15,000*l.* interest or share in the 3 *per cent.* consols; afterwards he says, "if I shall not die possessed of 3 *per cent.* Consolidated Bank Annuities sufficient," &c.; using more general language; and at the concluding part of the will, "in case I shall not have sufficient 3 *per cent.* Annuities," &c.; but he nowhere speaks of stock

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(*k*) 1 Myl. & K. 571.
(*l*) 10 Mod. 518.

(*m*) 5 Madd. 38.

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standing in his name; and it is remarkable that the 12,000*l.* consols lent on mortgage, and the subsequent investments made by the testator in that fund, together make up the precise amount of stock requisite to answer the legacy. The testator in his lifetime could have enforced a transfer of the stock by means of a bill of foreclosure, or he might have brought an action on the covenant in the mortgage deed. It is said the security might have proved deficient; but that is not material, for if the stock had been standing in his own name, and it had been transferred by a forged power of attorney, the same result would have happened.

[The *Lord Chancellor* :—The stock might have been standing in the name of trustees, who might have secretly committed a breach of trust by selling it out in the testator's lifetime; in which case the same difficulty would exist.]

The term "legacy of quantity" denotes a general, as distinguished from a specific, legacy; and it is so used by Lord *Thurlow* in *Ashburner v. M'Guire* (n). The testator therefore meant the legacy to be paid at all events, without reference to the state of his funds at his death; but the legacy was to be specific in this sense, that the stock possessed by him in the 3 *per cents.* was to be first applied in payment of it. In *Dowson v. Gaskoin* (o), an inquiry was directed as to the particulars of personal estate at the date of the will; and in the same volume of Reports containing that case, a similar instance occurs.

Mr. *Bethell*, in reply :—Throughout the argument for the Respondents, the question has been regarded as if the will were worded, "whereas I am possessed of

(n) 2 Bro. C. C. 114.

(o) 2 Keen, 14.

so much stock, now I hereby give the same." If the testator had used such language, it might perhaps with legal consistency be inquired, whether the word "possessed" admitted of a more extended signification; but the words are, "If I shall die possessed;" so that not only is attention not directed to what did then exist, but it is directed to what should thereafter exist. In no one instance in the will does the testator mention the stock as if he had it, but as if he had it not; and therefore the will must not be construed as if he had it.

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The *Lord Chancellor*:—I retain the opinion which I have more than once expressed during the argument. The testator bequeathed a sum of 15,000 *l.* interest or share in the joint stock 3 *per cent.* consolidated Bank annuities, to be deemed a legacy of quantity and to be due at his death, as if the same were a specific legacy, on certain trusts therein mentioned; and he provided that in case he should not have that sum in stock at the time of his death, in that case a sum of money should be raised from a leasehold term for 500 years, sufficient to purchase stock to make up the deficiency.

June 28.

Now the facts as to the state of the property were these:—he had purchased some time before his death 3,000 *l.* 3 *per cent.* consols; he had before that period a sum of 12,000 *l.* 3 *per cent.* consols; he had lent that 12,000 *l.* 3 *per cent.* consols to a relation of his, upon condition that that sum of consols should be retransferred and replaced at his request, and that in the meantime a sum equal to the dividends, and payable at the time that the dividends were payable, should be paid to him. Now my opinion is, that having this property at the time of his death, namely, the 3,000 *l.*

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3 *per cent.* consols, and being entitled, as I consider him entitled, to the other 12,000 *l.* 3 *per cent.* consols, he had, within the meaning of this bequest, at the time of his death 15,000 *l.* 3 *per cent.* consols; and that they would satisfy the terms of the legacy. Under such circumstances I consider that the judgment of the Court below was right.

Lord Campbell:—I entirely concur in the opinion expressed by my noble and learned friend. It seems to me to be in conformity with the principle well established on the subject, and in accordance with all the decisions; and I think it would be most formidable if it were to be supposed that we are departing from the principle that you cannot admit extrinsic evidence to show the sense in which a testator used any particular expression. I disclaim all intention of any such departure on this occasion; on the contrary, I have looked to the will, I have put an interpretation on it; and I apprehend that, according to the just interpretation of that will, stock which the testator does possess under the circumstances which are here proved, would be “possessed” by him at the time of his death. Then, the reference is merely to inquire whether he had any such stock; and it is not at all to put an interpretation on the will, but to apply the language of the will. I apprehend that according to common parlance, not putting any strained or secondary meaning on the language of the will, the testator may be supposed to say that he is possessed of stock, which he held under the name of stock. “Possessed” is a very flexible word. All that I die possessed of, would be all the personal property which I have: All the stock which I die possessed of, would be stock which I may have lent, and which is to be restored to me in

consequence of a contract which I may have entered into; and it is a matter which cannot depend, I think, on the remedy whether a Court of Equity would decree a specific performance or not. It is admitted that if it were a horse or anything of that sort, that was the subject of the contract, the testator might be considered in possession of it; but even in that case the remedy would only be damages to be raised from his lands, in respect of a breach of the contract. It seems to me, therefore, that the view taken of the case by his Honor the Vice-Chancellor, and by the late Lord Chancellor, was perfectly correct, and I move that the decree be affirmed with costs.

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Lord Cottenham:—This being an appeal against a judgment of my own in the Court of Chancery, I abstain from taking any part in the decision here; but I think it right to say that, in affirming the decision of his Honor the Vice-Chancellor in the Court below, I did not intend, in the slightest degree, to impeach any of the authorities which lay down the rule of law on the subject; and I find nothing in the report of the case at all leading to any opinion inconsistent with the propriety of those decisions. The order of reference made by the Vice-Chancellor, which is not appealed from, no doubt directed an inquiry as to the circumstances with regard to the testator's property at the time the will was made, and at the time of his death. It turned out that the circumstances at those two periods were identically the same; it would be, therefore, perfectly immaterial whether that order was right or wrong in directing the inquiry into the circumstances which existed at the time of making the will. It is quite immaterial, inasmuch as there are the same circumstances existing at those two

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periods, and there may be expressions referring to the facts as existing at the date of the will. In point of fact it was necessary to go into those circumstances, and it is part of the history of this transaction which did exist at the time of the testator's death. The stock had been lent at an earlier period. The matter proceeded entirely on the state of circumstances as they existed at the time of the death; which it is necessary, and a matter quite of course, to ascertain before you can know what the subject-matter is on which the bequest is to operate. Having by the Master's report ascertained what those circumstances were, the whole of the decision turns on this, namely, that there were words in the will sufficient to include the stock existing under the circumstances found by the Master's report. I certainly am of opinion still that the words in the will embrace property so circumstanced, and that appears to be the opinion of the noble and learned Lords who have already expressed their opinions on the subject; and my only object in stating that at all, is to disclaim any intention of introducing any new rule which is not the regular and established rule of the Court.

(It was ordered that the decree be affirmed, with costs.)

ROBERT JONES - - - - Plaintiff in Error.

1842:
July 1.

JOHN WAITE - - - - Defendant in Error.

A DEED of separation between a husband and his wife having been drawn up, but not executed by the husband;—
HELD that his executing such deed was a legal consideration for an agreement, by a third person, to pay a sum of money to the husband towards the discharge of certain debts and expenses, for which the husband was solely liable.

*Agreement ;
Con-
sideration.
Deed of
Separation.
Pleading.*

THIS was a writ of error on a judgment of the Court of Exchequer Chamber, affirming a judgment of the Court of Common Pleas, in an action brought by *John Waite*, the Defendant in Error, against *Robert Jones*, the Plaintiff in Error.

The declaration (in *assumpsit*) stated that *Jones*, on the 19th of *October* 1833, signed a certain memorandum in writing, whereby he agreed with *Waite* that the time mentioned in a certain deed of separation for *Waite's* quitting a certain house at *Holloway*, should be extended to the 9th of *December* then next, inclusive; and also to pay *Waite* the sum of 160*l.* by eight half-yearly payments, towards Messrs. *Horne* and *Gates'* demand of 366*l.* 4*s.* 9*d.*, *Waite* taking the whole of such demand on himself; the payments to be made at the times of the payment of the annuity mentioned in the deed of separation: and *Jones* agreed to pay 20*l.* towards liquidating certain outstanding debts at *Richmansworth*; and also 220*l.* towards certain household expenses at *Holloway*; such last-mentioned sum of 220*l.* being divided into two payments, one-half thereof being

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payable at *Michaelmas-day* then next, and the other half at *Lady-day* 1835. And by the said memorandum it was stated that *Jones* agreed to the above, *in consideration of Waite's executing the deed of separation*, and agreeing to pay Messrs. *Horne* and *Gates*, and the household expenses and *Rickmansworth* debts in full.

The declaration then averred that *Waite*, confiding in the said agreement of *Jones*, and in consequence thereof, was *induced to, and did then, execute the said deed of separation* in the said memorandum mentioned, viz. a deed of separation between *Waite* and his wife; and agreed to pay Messrs. *Horne* and *Gates* their said demand of 366 *l.* 4 *s.* 9 *d.*, and the said household expenses and debts in full; and then took upon himself the payment of the said demands, debts, and expenses, whereof *Jones* then had notice; yet that he, *Jones*, refused (although often requested) to make the first payment of the said sum of 220 *l.* so agreed to be paid by him towards the household expenses at *Holloway*; which first payment, amounting to 110 *l.*, became due by virtue of the said agreement, and ought to have been paid, at *Michaelmas* 1834; but the same remained still due from *Jones*, and *Waite* was obliged to pay the same out of his own monies.

To this declaration *Jones* pleaded, first, the general issue; secondly, that at the time of the supposed signing of the supposed memorandum in the declaration mentioned, and before and at the time of the commencing this suit, *Waite* was solely liable to pay Messrs. *Horne* and *Gates* the payments, the supposed agreement by him to pay which was, by the said supposed memorandum, stated to be in part the consideration for *Jones* agreeing as is alleged to be in the said supposed memorandum agreed by him.

And further, that *Waite* was, at the said time of the supposed signing of the said memorandum, and before and at the time of the commencing this suit, solely liable to pay the said household expenses and *Rickmansworth* debts in full; the supposed agreement by *Waite* to pay which expenses and debts in full was, by the said supposed memorandum, stated to be in part the consideration for *Jones* agreeing as was alleged to be in the said memorandum agreed by him.

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The Defendant in Error (*Waite*) demurred specially to the second plea, for duplicity; and the Plaintiff in Error (*Jones*) having joined in demurrer, the same came on to be argued in the Court of Common Pleas, in *May* 1835, when judgment was given by that Court for *Waite* (1 *Bingh.* N. C. 656, where the pleadings are formally set out).

Jones brought a writ of error in the Exchequer Chamber, by which the judgment of the Court of Common Pleas was affirmed: three of the five Judges before whom the case was argued, agreeing in the judgment of the Court of Common Pleas; the other two, Lords *Denman* and *Abinger*, dissenting (5 *Bingh.* N. C. 341, and 7 *Scott*, 31).

The principal question raised on the present writ of error was, whether that part of the consideration for the agreement which is not answered by the plea, viz. the execution of the deed of separation by the Defendant in Error, was sufficient to support the promise, or whether it was an illegal and void consideration. That question was argued in the presence of the Judges (*a*).

(*a*) Among the Judges present were, Lord Chief Justice *Tindal*, Mr. Justice *Williams*, Mr. Baron *Parke*, and Mr. Baron *Alderson*. The Judges before whom the case was argued in the Courts below, are named in the Reports above referred to.

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Mr. T. F. Ellis, for the Plaintiff in Error(b):—The grounds upon which the judgments in the Courts below were rested, might be reduced to these three:

1st, That though it is true that an agreement by a husband *to separate* from his wife would not be a good consideration for a promise by a third party to pay him money; yet, if the husband and wife *had already agreed to separate*, the execution of the separation deed by the husband would be a good consideration for a promise by a third party to indemnify the husband against past expenses, especially where such expenses were incidental to the past or present relation of the husband to the wife: 2d, That it appeared from the record that the husband and wife here *had already agreed to separate*, and also that the expenses were incidental to the past or present relation of the husband to the wife; and 3d, That even if the record did not show these facts, they would be presumed, in order to avoid presuming the transaction to be illegal.

To these grounds of the judgments below it may be answered: First, that even if a husband and wife had agreed to separate, and the husband had, either from previously living with his wife, or from any steps taken with a view to the separation, already contracted a sole liability to make payments, a subsequent contract by a third party to pay him money for the purpose of indemnifying him against such payments, *in consideration of his executing* the deed of separation, would be illegal, or at best void. The permission of the husband to the wife to live separate from him, does not affect the legal consequences of marriage, and he is nevertheless answerable. He may revoke the

(b) The Solicitor-general was with him, but was called away, as he was opening the case, to attend his official duties.

permission; for he may go into the Ecclesiastical Court, and sue for a restitution of conjugal rights; and that Court would treat even a deed executed, granting such permission, as waste paper. A Court of Equity also would refuse to enforce such a deed, as being contrary to the policy of marriage; *Worrall v. Jacob* (c), *Wilkes v. Wilkes* (d); nor could it be enforced by action at law. It cannot possibly be the subject of bargain that a man shall sign a deed of separation from his wife; and it is no answer to say that the separation had in fact taken place, and that it was only the completion of what had been before agreed upon that was stipulated for: because the execution of the deed of separation is one step in furtherance of the arrangements for separation, and in carrying the separation into effect; and if it be (as was admitted in the Courts below) illegal to separate in consideration of money to be paid to the husband, it is equally so to take any single step in furtherance of the separation for such consideration. The fact that the husband's liability to the household expenses arose from the past or present relation of the husband to the wife, would make no difference in this view: because payments to a man, made in order to enable him to pay what he was *previously solely* liable to pay, are like any other payments of money to him. The present case bears no analogy to that of a contract made by a husband, who *has separated* from his wife, with trustees, for mutual indemnification against *future* liabilities to be produced by the separation; such contract creating no motive towards the act, but simply providing against the *future* consequences of an act already complete; and so covenants to indem-

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(c) 3 Meriv. 268.

(d) 2 Dick. 791.

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nify may be sued upon; *Stephens v. Olive* (e), *Elworthy v. Bird* (f). The case of *Nunn v. Wilsmore* (g) does not militate against the general rule; neither does *Warrender v. Warrender* (h), nor *Hindley v. Marquess of Westmeath* (i).

Secondly, this record shows neither a *previous* agreement to separate, nor that the household expenses, towards which the payments by the Plaintiff in **Error** were to go, were incidental in any way to the past or present relation of the husband to the wife. As to the separation, the record shows only that a deed of separation had been drawn up; but it is not said by whom it was drawn up, nor that the wife had ever known of its existence: and as to any assent by the husband, it appears only that he was induced to sign it by the promise of money, upon which this action was brought. Bargains on the subject of marriage have always been discountenanced by the Courts. A wager creating a pecuniary inducement to abstain from marriage has been held void, *Hartley v. Rice* (k); so also was a covenant not to marry any one except the plaintiff, in *Lowe v. Peers* (l); so also was a condition annexed to a legacy given to a woman; the condition being that she would live apart from her husband; *Brown v. Peck* (m), *Tennant v. Braie* (n). An act may be legal, as, for instance, not to marry, or vote in the election of a Member of Parliament; but it would be illegal to covenant, to do, or to forbear to do, the act for a pecuniary consideration; *Key v. Bradshaw* (o), *Allen v. Hearn* (p). There is

(e) 2 Bro. C. C. 90.
 (f) 2 Sim. & Stu. 372.
 (g) 8 T. Rep. 522.
 (h) 2 Clark & F. 488.
 (i) 6 Barn. & C. 200.
 (k) 10 East, 22.

(l) 4 Burr. 1225.
 (m) 1 Eden, 140.
 (n) Toth. 78.
 (o) 2 Vern. 102.
 (p) 1 T. Rep. 56.

no averment whatever on the record respecting the nature of the household expenses, nor how, or by, or for whom, they were incurred, except the explanation furnished by the plea; namely, that the plaintiff was solely liable for them.—[Lord *Brougham*, referring to the report of the judgment in the Court below, said the Judges held the deed of separation not to be illegal, so far as it appeared on the record. The illegality, if any, must be averred on the record.]

The Defendant in Error says on the record, in effect, that he would not have executed the deed but for the consideration: is, then, the mere allegation of the deed itself sufficient ground from which to intend a previous agreement to separate? The question, whether the record shows either of the supposed facts, may be tried by supposing a plea to deny the facts and conclude to the country. Such a plea would clearly be demurrable, as putting in issue matter not alleged.

Thirdly, no presumption of such facts can be made, if the record does not show them. It may be true that the Courts, to avoid presuming illegality or fraud, will interpret the language of documents in the most favourable sense; but where the language shows a *prima facie* illegality, except upon the supposition that additional facts exist neutralising the illegality, it lies upon the party insisting upon the legality of the transaction to aver such additional facts. If it were necessary for the party disputing the legality to negative by averment the existence of every conceivable fact which could remove the *prima facie* illegality, no transaction could ever be shown to be illegal. If one fact be negatived by the record for the purpose of excluding its intendment, others might in every case be suggested, and it is impossible to

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say to what length a record must go in denying non-alleged facts. And such a principle would impugn the authority of every case in which illegality has been inferred from the record: for no case can be shown, and scarcely any can be conceived, in which some independent fact might not be supposed which would neutralise the illegality. And further, if any presumption be made, it will be that the husband and wife were living together, in conformity with the general policy of the law.

It may be added, that no action could have been maintained against the husband for not executing the deed pursuant to the memorandum of agreement; and that therefore, supposing the first part of the consideration not to have been illegal, the agreement was at least void for want of mutuality; *Durant v. Titley* (q), *Jee v. Thurlow* (r), *Fletcher v. Fletcher* (s), *Westmeath v. Westmeath* (t), *Lord St. John v. Lady St. John* (u). The cases of *Lord Rodney v. Chambers* (x) and *Guth v. Guth* (y) are both disapproved of by Lord Eldon, in *Lord St. John v. Lady St. John*; and *Guth v. Guth* by Lord Loughborough, in *Legard v. Johnson* (z).

Mr. V. Richards, with whom was Mr. Peacock, for the Defendant in Error:—Deeds of separation between husband and wife are not necessarily illegal, but rather in the greater number of instances they are legal. The cases on this subject are collected in Jacob's edition of *Roper's Husband and Wife* (a). The excepted case is where the deed contemplates

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|----------------------------|------------------------------------|
| (q) 7 Price, 577. | (u) 11 Ves. 526. |
| (r) 2 Barn. & C. 547. | (x) 2 East, 283. |
| (s) 2 Cox, 99. | (y) 3 Bro. C. C. 614. |
| (t) 1 Jac. 126; 1 Dow & C. | (z) 3 Ves. 352. 361. |
| 547; 5 Bingh. N. C. 339. | (a) Vol. ii. p. 269 <i>et seq.</i> |

a future separation, which is void; *Hindley v. The Marquess of Westmeath* (b). Here the question turns upon the plea, which we submit is ill. The Plaintiff in Error is precluded by the state of the record from taking an objection to the deed for illegality. The agreement is set out in the declaration, and the allegations on the record do not warrant the confounding the execution of the deed with the agreement to separate, which preceded it; *Wilson v. Musket* (c), *Hill v. Manchester and Salford Waterworks* (d). Illegality of consideration must be pleaded specially, *Potts v. Sparrow* (e). There is nothing on the face of the agreement to make it void; illegality must be specially pleaded;—

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The Lords stopped the learned counsel; and by their Lordships' directions,—

Mr. *Ellis*, in reply, observed on the cases which Mr. *Richards* had cited. He contended that they supported his argument.

Lord *Brougham*:—I collect from the learned Judges that they do not consider there was any illegality disclosed by the agreement; there is no averment on the record to show it was illegal.

Lord Chief Justice *Tindal*:—My brothers and myself are of opinion that there is no illegality disclosed by this agreement. One part of the consideration for it is the execution of the deed of separation, which, as clearly appears from the declaration, was previously agreed upon and drawn up. The second part of the consideration is the payment towards the dis-

(b) 6 Barn. & Cres. 200.
(c) 3 Barn. & Adol. 763.

(d) 3 Barn. & Adol. 544.
(e) 1 Bingham N. C. 594.

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charge of the demand of Messrs. *Horne* and *Gates*; there is no ground for supposing illegality in that; and the question therefore comes to this,—was the deed of separation which the party agreed to execute illegal? We are bound to say that in the way in which it is presented to us on the record, there is no illegality shown (*f*).

Lord *Campbell*:—We are not to know here what the deed of separation was, further than as it appears by the record; and on the record no illegality is disclosed.

Lord *Brougham*:—I agree with the learned Judges that nothing is disclosed on the face of the pleadings to show the agreement to be illegal. I think the judgment must be affirmed, and with costs.

(It was ordered accordingly, that the judgment of the Court of Exchequer Chamber be affirmed, with costs.)

(*f*) As to the legality of deeds of separation between husband and wife, see, besides the cases cited *supra*, pp. 106 and 108, the recent case of *Clough v. Lambert*, 10 Sim. 174.

JAMES HAMILTON - - - - - *Appellant.*

1842 :
March 5.
August 2.

JOHN WRIGHT, JOHN TELFORD, and }
HUGH MONCREIFF, Trustees of } *Respondents.*
THOMAS WRIGHT, deceased - - }

A TRUSTEE is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.

Trustee.
Annuity.

A trust was created by a debtor for the benefit of creditors, and the trustee had the power to bind the debtor personally and heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for the debtor. The trustee purchased an annuity granted by the debtor, after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor.—

It was held that they could not do so, and a decree of the Court of Session, affirming their right, was reversed.

THE process now under appeal originated in a bill of suspension at the instance of the Appellant, who was charged by the Respondents, in letters of horning, for payment of certain sums contained in a bond of annuity, dated the 10th *December* 1817; in which bond the Appellant is a co-obligant.

The following are the circumstances out of which this litigation has arisen :

On the 16th *October* 1815, the Appellant, being then indebted to several persons, executed in favour of *John Campbell* a trust disposition of his estate and effects, for the behoof of his creditors. The following were declared to be the purposes for which the trust was granted, viz.: “ *Primo*, for payment of the expense

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attending the execution of this trust, and the regular payment of the burdens affecting, or which shall affect, the said lands and others; *Secundo*, for payment to me, during my life, of a free yearly annuity of 600*l.* sterling, payable at Candlemas, Whitsunday, Lammas, and Martinmas, by equal portions, beginning the first term's payment thereof as at the term of Lammas last, and yearly thereafter at the terms before mentioned; and I shall be farther allowed to retain my household furniture upon a receipt and obligation to redeliver the same, or its estimated value, when required to do so by my trustees, reserving any preferences which may be acquired thereon; *Tertio*, it is hereby provided and declared, that these presents are granted for and to the special end and effect, that my said trustee shall, from time to time, apply the prices and whole proceeds of the lands and others above disposed, and the debts and other effects generally above conveyed, or prices thereof, for payment to my creditors above named, or to those who shall appear to my said trustee to have been lawful creditors of me at the date hereof, although not herein before mentioned, whom my said trustee is authorised to assume into the benefit of this disposition, and that according to the extent of their several debts, and to their several rights and preferences, conform to a scheme of division to be made thereof among my said creditors, duly authorised by the said trustee for the time; declaring that this disposition shall not import, be construed, or understood to prefer any one creditor to another, or to postpone or annul the right and diligences of any creditor already done or acquired, but that the creditors' preferences among themselves shall remain unhurt and not prejudged, in the same manner as if these presents had never been granted,

reserving all objections to such rights and securities competent at law, and that without anywise infusing or affecting the said security."

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By bond of annuity, dated 10th *December* 1817, subscribed by *Thomas Bowes*, present Earl of *Strathmore*, and *John Buchan*, writer to the signet, and by the Appellant *James Hamilton*, writer to the signet, the said several parties, in consideration of the sum of 2,000*l.* sterling, advanced by *John Telford*, bound and obliged themselves, conjunctly and severally, their heirs, executors, and successors whatsoever, to pay to the said *John Telford*, his heirs and successors, an annuity of 221 *l.* 13*s.* 4*d.* for his natural life, beginning the first term's payment at Whitsunday 1818, for so much as should be then due; and the next term's payment at Martinmas thereafter, for the half year preceding that term; and so forth, during the natural life of the said *Thomas Bowes*, and the non-redemption of the said annuity; with a fifth part more of each term's payment of liquidate penalty in case of failure of punctual payment of the same, and the legal interest of the said annuity from the respective terms of payment thereof, during the not-payment of the same; but the said annuity to be redeemable in manner therein mentioned.

John Telford, in consideration of 2,000*l.*, assigned this bond, together with the whole annuities which should fall due and payable from and after the term of Whitsunday 1822, to and in favour of *Thomas Wright*.

Mr. *Campbell* having resigned the trust under the deed of 1815, *Thomas Wright*, in 1818, and the Respondent, *John Wright*, in 1824, succeeded to it.

Mr. *Thomas Wright* died in 1829, having by his

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will appointed the Respondents his executors and trustees of his estate.

The Appellant having become much in arrear with the annuities, the Respondents instituted proceedings against him for the recovery of the arrears. He presented a bill of suspension on various grounds, to some of which it will not be necessary now to refer. Those which are material to this case are as follow: "First, the said *Thomas Wright* was barred *personali exceptione*, as trustee for the complainer and his creditors, as well as by his actually subscribing the deed of accession, from doing any act or deed to the prejudice of the complainer or of the trust under his charge. Secondly, the said *Thomas Wright*, as trustee for the complainer, could only acquire any debt, against the complainer or his estate, for behoof of the complainer, and in particular of that trust over which he presided as trustee. Thirdly, the said *Thomas Wright*, the complainer's trustee, was, by acceptance of that trust, bound to fulfil the primary obligation incumbent on him by the trust deed under which he acted, by making regular payment to the complainer of the stipulated annuity of 600 *l. per annum* under the trust, and not to withhold or divert the same to the prejudice of the complainer; and the chargers, his representatives, holding possession of the estate under the title in his person, are bound to do the same; and that, in consequence of thus withholding the said primary annuity, the chargers are indebted to the complainer in a sum exceeding by three times the amount of the annuity charged; for, even assuming their claim is a just one, the same is extinguisher, satisfied, and paid, by retention of the complainer's annuity." The Appellant at the same time instituted an action of reduction of the bond in

question, in which he repeated, as grounds of reduction, the whole of the pleas contained in his bill of suspension.

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The Respondents, in consequence of an error in the testing clause, commenced an ordinary action against the Appellant, for the purpose of having the debt declared. In this action they narrated the bond and the annuities stipulated to be paid in consideration of the sum advanced by Mr. *Telford*, and concluded for payment of the by-gone arrears, and the annuities still due and to become due. In defence of this action, he repeated the pleas maintained by him in the processes of suspension and reduction, already noticed. These three actions were conjoined by order of the Court. Certain interlocutors were pronounced affirming the validity of the bond, and the right of the Respondents under it; and these interlocutors were affirmed, on appeal, by this House.

On the cause being remitted to the Court of Session, it was taken before Lord *Cockburn*, as Ordinary. The Appellant then maintained before his Lordship, First, that Mr. *Wright*, as trustee of the Appellant, could only acquire any debt against the Appellant or his estate for behoof of the Appellant, and in particular of that trust over which he presided as trustee; and was barred by his character of trustee, and by his being a party to the deed of accession to the trust, from making the debt acquired by him a ground of proceeding against the person or estate of the Appellant: Secondly, that Mr. *Wright*, as trustee, was bound to fulfil the obligations in favour of the Appellant, incumbent on him by the trust deed; and that he paid himself the annuities claimed, by the retention of the preferable annuity due to the Appellant under the trust, and by his professional employ-

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ment as agent therein : And, thirdly, that he had intromitted largely with the estates of *Fairholme* and *Kirkton*, to which the Appellant had right, and had thereby extinguished the annuity in question.

The Lord Ordinary, on the 30th of *November* 1838, pronounced the following interlocutor :—"The Lord Ordinary having heard the counsel for the parties on these conjoined processes of ordinary action, reduction, and suspension, Finds, that the late *Thomas Wright*, when he acquired the bond in favour of the late *John Telford*, which is the ground of the present charge and ordinary action at the instance of his, *Wright's*, trustees, was the trustee of *James Hamilton*, one of the debtors in the bond, who now suspends a charge and defends an ordinary action thereon : Finds, that *Wright*, being trustee for *Hamilton*, could not competently acquire the bond for his own benefit : Finds, that the said *Thomas Wright* was, and that his trustees now are, bound to communicate any advantage that may have accrued, or may yet accrue, from his transaction, to the trust estate of the said *James Hamilton* ; and that they cannot sue on a bond so acquired for their own behoof : Finds, that the said *James Hamilton* is not bound, by any judgment hitherto pronounced in any of the processes, from maintaining this plea. Therefore, but under reservation of the chargers being settled with as above, and of their right to institute any competent proceedings that may be necessary for enforcing or securing this right, sustains the above defence against the ordinary action at the instance of *Wright's* trustees, and the above reason of suspension of their charge, and decerns ; reserving consideration of all other points in the cause, expenses included, until this interlocutor shall have become final, or shall have been altered."

The First Division of the Court of Session, by an interlocutor dated the 26th of *February* 1839, reversed this interlocutor, and remitted the cause to the Lord Ordinary with a direction ; and on the 20th *November* 1839 pronounced a final interlocutor in favour of the Respondents. The present was an appeal against these two interlocutors of the Court of Session.

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Mr. *Pemberton* and Mr. *Anderson*, for the Appellant:—It is a principle of law that a trustee cannot have any dealings with the trust estate, so as to give himself an advantage, or to create in himself an interest at variance with that of the trust. In this case, the trust deed of 1815 gave the Appellant a preference of rights over the creditors, so far at least as the annuity was concerned. He had therefore, to that extent, a right to control the actings of the trustee. It is clear that the dealings of the trustee with the estate for his own benefit are illegal. They are so as much by the law of *Scotland* as by the law of *England*; *Erskine* (a), *Maxwell v. Maxwell* (b), where it was held that a trust disposition of land having been granted to prevent the rigour of creditors, the person entrusted was found to have no right, in consequence of assignments he had taken, to receive more of the debts compounded for than he had truly paid. The same principle—that of compelling the trustee to give to the trust the benefit of any transaction he may have in respect of the trust estate—was recognised and acted on in *Rae v. Glass* (c), *Sinclair v. Maxwell* (d), *Wright v. Wright* (e), and *Crawford v. Hepburn* (f). The law in the two countries is the

(a) Princ. I. 7. 19.
(b) Morr. 16166.
(c) Id. 16170.

(d) Morr. 16186.
(e) Id. 16193.
(f) Id. 16208.

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same in this respect. Here it is plain that *Wright*, having purchased this annuity bond, must be taken to have purchased it for the benefit of the persons for whom he was made trustee, namely, for that of the Appellant and the creditors. The cases cited are decisive on this point, and he must therefore be held accountable for the bond to them, and can only claim from them the price he has actually paid for it. The decree of the Court below is consequently erroneous, and must be reversed.

Mr. *Stuart* and Mr. *S. Gordon*, for the Respondents:—The obligations of a trustee to the *cestui que* trust may be admitted to be what are stated on the other side, and yet the result contended for will not follow. A trust enures as against the trustee only for the benefit of those for whom he was trustee at the time of its creation. Here the annuity deed was executed after the date of the creation of the trust, and cannot therefore be affected by it. The annuity was not a thing claimable under the trust deed, and forms therefore no part of the property over which the Respondent's testator became trustee. Assuming, therefore, the doctrine as stated on the other side to be correct, the facts of this case will not bring the Respondent within its operation. But that doctrine has been stated too broadly; it is subject to some qualifications; *Coles v. Trecothick* (g). If the *cestui que* trust should know of the dealing with the trust property, if that dealing should be fair and open, and the *cestui que* trust should make no objection to it, but allow it to proceed to its termination, he cannot afterwards claim to have it set aside; *Randall v. Errington* (h). In that case the purchase was set

(g) 9 Ves. 234.

(h) 10 Ves. 422.

aside, because the trustees had not brought themselves within the exception to the rule; but the exception itself, namely, that of a case where full information was given to the *cestui que* trust, and no advantage taken by the trustee, was distinctly established. In *Gregory v. Gregory* (i), a bill to set aside a purchase by a trustee was dismissed by the Master of the Rolls (Sir *W. Grant*), for length of time only, the plaintiffs having allowed 18 years to elapse between the time of the purchase and the filing of the bill; and that decision was confirmed by the Lord Chancellor on appeal (k). Here the purchase was made at a fair amount; no creditor complains of it, and many years have been allowed to elapse without an attempt to disturb it. Besides this, the whole case must be considered as disposed of by the former decisions, which were confirmed in this House.

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Mr. *Pemberton*, in reply:—This case does not depend on the questions raised on the other side. The simple point here is, whether *Thomas Wright* did not by this purchase create in himself a personal interest opposed to his duty and interest as trustee, and to the benefit of the trust itself. If he did, the question whether the money paid was a fair price, or whether a long time has been suffered to elapse since the purchase, will not affect the decision.

Lord *Brougham*:—My Lords, the Appellant in the year 1815 executed a general trust disposition of all his estate, for the benefit of his creditors. In 1818 *Thomas Wright* became a trustee under that deed, by a clause of devolution; and in the intermediate time, viz. in 1817, the Appellant had become surety or

August 2.

(i) Coop. Ch. Cas. 201.

(k) 1 Jac. 631.

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cautioner for Mr. *Bowes*, now Earl of *Strathmore*, in a bond for the payment of an annuity during his life for 223 *l.* 13 *s.* 4 *d.*; the price of which was 2,000 *l.*, advanced by *Thomas Telford* to Mr. *Bowes*. The trustee, *Thomas Wright*, in 1822 obtained an assignment of this bond for a valuable consideration; and the main question, indeed the only question upon which the whole case now turns, is the right which he, as trustee, had to purchase for his own benefit this annuity payable by the Appellant. The Respondents, as representing *Thomas Wright*, deceased, whose trustees they were, having in vain attempted to obtain payment from the principal debtor Lord *Strathmore*, gave a charge against the Appellant, as to which he brought a bill of suspension. An ordinary action was then brought against him by the Respondents, for constitution of the debt and payment of the arrears of the annuity; to which he urged in defence the same matter which formed the ground of his suspension. He also sought to set the bond aside in an action of reduction, chiefly on the ground of an informality in the execution and testing clause. In this he failed, both below and when the matter was brought by appeal before your Lordships. But the other question between the parties cannot be considered as concluded by the first decision and its affirmance here; for the interlocutor which repelled the reason of reduction assoilzieing the defenders (the present Respondents), also contained an order to hear counsel further on the suspension and ordinary action, all the three suits having been conjoined. The Appellant therefore had never been heard, and the Court, whether below or here, had never decided upon anything but the informal execution of the bond; and no defence of *res judicata* can be allowed to bar his claim upon the other ground. In the suspension and action,

the Lord Ordinary having decided that the trustee, *Thomas Wright*, could not purchase the annuity for his own benefit, with other consequential findings, amounting in substance to giving the Appellant the benefit of the purchase upon paying the price given by *Thomas Wright*, with interest; the Lords of the First Division altered this interlocutor so far as to repel the Appellant's fifth plea in law, that is, to find that *Thomas Wright* had validly purchased the annuity; and they remitted to the Lord Ordinary to proceed further, who thereupon, and on the footing of that finding as to the fifth plea, pronounced the other consequential interlocutor appealed from, after it had been adhered to by the Lords of the First Division. Their Lordships also refused leave to appeal from their interlocutor altering the Lord Ordinary's former interlocutor. Thus the question turns upon the trustee's right to purchase the annuity, and that depends upon the nature of the trust.

Now the uses declared in the trust deed were these : first, to pay the expenses attending the trust, and the burthens affecting the real estate. Secondly, to pay the Appellant an alimentary annuity of 600*l.* by four quarterly payments. Thirdly, to pay the Appellant's debts equally, according to their nature and the rules of legal preference. Lastly, to pay over the surplus to the Appellant, for whose reversion he was thus a trustee, as much as for his annuity and for the creditors. It may be added, that before *Thomas Wright* became trustee, an arrangement had been made by which the Appellant was employed to manage the law business of the trust; consequently his claim for his expenses, as such, became the very first of all the debts to be discharged by the trustees. It is material to add that the deed contains a clause expressly empowering

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the trustee, not only to sell and burthen the whole estate, and to sue and compound debts, but to bind the Appellant, his heirs and successors, in payment of such sums as may be borrowed, and of the interest that may become due therefrom, and the penalties for nonpayment of the same. *Thomas Wright*, who afterwards became trustee, and who was a principal creditor, joined in executing a deed of accession to the trust deed, and bound himself with the others not to commence any suit, or sue out any execution, against either the person or estate of the Appellant during the subsistence of the trust. When he afterwards accepted the trust, it became his duty as trustee to do nothing for the impairing or destruction of the trust, nor to place himself in a position inconsistent with the interests of the trust. It seems quite impossible to deny that when he took an assignment of the annuity, that is to say, a bond in which the Appellant was the obligor, his interest as assignee became opposed to the interests of the *cestuis que trust*. The Appellant was one of these *cestuis que trust*; he was even the first named. His annuity was preferable to the claim of any creditor; but it was not preferable to the debt which the trustee purchased by the assignment. In another respect, and still more materially for the present purpose, the Appellant was a *cestui que trust*: *Thomas Wright* was trustee for him, of the reversion; it was therefore his duty to make that as large as possible after payment of the creditors. The purchase has been contended to give the trustee an interest in lessening this reversion, and the Lord Ordinary takes this view of it. But one interest it clearly gives the trustee, and an interest in direct conflict with that of the creditors: he had a power to bind the Appellant personally and heritably for the benefit of the

trust; but the annuity which he purchased made it his interest not to bind the Appellant in any way that could give a preference over his obligation in the bond, and give any other person a priority over himself as purchaser of the annuity bond. The annuity was a debt contracted after the trust deed, and in respect of which there was no covenant not to sue or to take execution against both person and estate. Surely it cannot be doubted that a creditor thus unfettered by the provisions of the deed, enabled in a great measure to defeat its objects, stands in a position adverse to the creditors under the deed: but if so, the trustee under the deed had no right to place himself in that position, and could not do so for his own advantage.

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There cannot be a greater mistake than to suppose, as seems to have been done below, that a trustee is only prevented from doing things which bring an actual loss upon the estate under his administration. It is quite enough that the thing which he does has a tendency to injure the trust; a tendency to interfere with his duty. The trustee cannot purchase the trust estate, though at a sale, without leave of the Court; and yet he might, probably would, if at an auction, give as good a price as any one else. So by the law of *Scotland* he cannot purchase outstanding debts (*l*). Then if it be said that the creditors are not actually injured, or that the fund either to pay them, or to hand over by way of reversion to the creator of the trust deed, cannot be lessened by such purchases, inasmuch as the debts must be satisfied whether payment is made to the original creditor or to the trustee who takes an assignment,—the answer is, that he shall not avail himself

(*l*) Fac. Coll., 6 March 1817.

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of rights so purchased by him, although these rights might not have come in competition with the trust had he not purchased; and so it has been decided in *Wright v. Wright* (*m*), and in *Anderson's Case* (*n*). Nor is it only on account of the conflict between his interest and his duty to the trust that such transactions are forbidden. The knowledge which he acquires as trustee is of itself sufficient ground of disqualification, and of requiring that such knowledge shall not be capable of being used for his own benefit to injure the trust; the ground of disqualification is not merely because such knowledge may enable him actually to obtain an undue advantage over others. In *Ex parte Lacey* (*o*), Lord Eldon denied the doctrine supposed to have been delivered by Lord Loughborough in *Whichcote v. Lawrence* (*p*), that a trustee must make some advantage of his purchase before it can be set aside; because in 99 cases out of every 100, he held that it might be impossible for the Court to examine into this matter. So the conduct of the trustee not being blameable in the purchase, is nothing to the purpose; for the Court must act, his Lordship said, upon the general principle; and unless the policy of the law makes it impossible for the trustees to do anything for their own benefit, it will be impossible for the Court to see in what cases the transaction is morally right, and in what cases it is not. The ordinary case has been, when the question arose upon a purchase of debts owing at the time of the trust being created. But the purchase of a debt subsequently incurred, if that be relied on as taking the present case out of the general rule, gives the trustee, whose duty it is to keep the residue as large as possible for the debtor, an interest in cutting it down, at least by the amount

(*m*) Morr. 16193.
(*n*) 21 Nov. 1740.

(*o*) 6 Ves. 626.
(*p*) 3 Ves. 740.

of his own debt: it also gives him an interest in keeping as large a fund as possible free from the operation of debts prior to his own, in order that his own may be the more surely and speedily satisfied; and this is an interest directly in conflict with his duty under the trust to the prior creditors.

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The interlocutors appealed from must be reversed so far as to restore the interlocutor of the Lord Ordinary of the 30th *November* 1838, which was afterwards altered by the Lords of the First Division.

Lord *Campbell* :—My Lords, it is quite enough for me to say that I entirely concur in the view taken of this subject by my noble and learned friend. It is quite clear that *Thomas Wright*, as trustee, could not purchase this bond for his own benefit, and that his representatives therefore could not sue upon it for the benefit of his estate; and that when the obligor, the Appellant, shall have paid back all the purchase money that was paid by *Thomas Wright*, with interest, the Respondents will have no further claim on the Appellant's estate in respect of such purchase.

Lord *Brougham* :—My noble and learned friend the Lord Chancellor, who is not now present, who heard this cause with my noble and learned friend and myself, has no doubt whatever upon the question, and authorised me this morning to state as much to your Lordships. There having been no difference of opinion on the part of the Judges of the Inner House with respect to this judgment, we thought that, before reversing it, we were bound to take time fully to consider it. We have done so, and I have now stated the result of our deliberations.

Judgment of the Court of Session reversed.

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March 8.
August 5.

JOHN CLARK, and MARY CLARK his } *Appellants.*
Wife - - - - - }

JOSHUA SMITH, and PRISCILLA his } *Respondents.*
Wife, and WILLIAM POE SMITH - }

Power.
Costs.
Practice.

ON the marriage of *T. P.*, a settlement was made of certain lands held on a lease for lives renewable for ever. The settlement gave *T. P.* an estate for life, and contained the following power of leasing: "It shall be lawful for *T. P.* and all and every other person or persons to whom any use is hereby limited, when in actual possession of the said lands, &c., to demise the said lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, &c. *T. P.* granted a lease to *A. P.* at a farm-rent, for the lives of three persons therein named; with a covenant, that on failure of any of the three lives, the lessor, his heirs and assigns, would, on the payment of 5 *l.* as a fine upon each life that should happen to die, add to the time and term of the lease the life of another person, nominated by the lessee, from time to time successively for ever.—

Held that this lease was not warranted by the power; and a decree by the Court of Chancery in *Ireland*, directing specific performance of the covenant of renewal, was reversed, and the bill ordered to be dismissed with costs.

The Appellant had, under the decree of the Court below, paid the costs of the suit. This House would not make an order for him to be repaid such costs, but left him to apply to the Court below, on the judgment now pronounced.

BY indenture of settlement dated the 26th of *June* 1781, and made on the intermarriage of *Thomas Palmer* the younger with *Mary Palmer*, the lands of *Tubrit* or *Tubrid* therein particularly described, being an interest of freehold for three lives with covenant for perpetual renewal, were settled and assured to the use of *Thomas Palmer* for life; and from and after his death, if *Mary* his intended wife should survive him,

then to other uses, subject to the incumbrances therein mentioned. Certain trusts were then created, and the settlement contained the following leasing power:—
 “Provided also, nevertheless, and it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said *Thomas Palmer* the younger, and all and every other person or persons to whom any use or estate is or are hereby limited, when they shall respectively be in the actual possession of the said towns, lands, and premises, or any of them, by indenture under their respective hands and seals, to demise or lease the said lands and premises, or any part thereof, to any person or persons for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy; and so as in every such lease of all or any part of the said granted and released premises, the best and most improved yearly rent that can be reasonably had or obtained for the same, shall be reserved and made payable, without taking any sum or sums of money, or other thing, by way of fine, for the making any such lease or leases; and so as none of the said leases be made dispunishable of waste, and that in every such lease there shall be contained a clause of re-entry for nonpayment of rent to be thereby reserved; and so as the lessee to whom such leases or lease shall be made, do sign, seal, and execute counterparts of such lease or leases, anything herein contained to the contrary notwithstanding.”

By indentures of lease and release, of the 9th & 10th of *November* 1783, *Thomas Palmer* demised to *Amos Palmer*, his heirs and assigns, the said lands of *Tubrit* or *Tubrid*, then in the possession of *Amos Palmer*, for

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the life and lives of three persons therein named, and of the survivors and survivor of them, and of all and every such other person and persons as by virtue of the said indenture of release, and the covenant for perpetual renewal in the same indenture contained, should from time to time successively thereafter be added to the term of the said demise, such demise then being consistent with the estate of the said *Thomas Palmer*, at the yearly rent of 164*l.* Irish currency. The covenant for perpetual renewal in the said demise contained, was in the words following:—"And the said *Thomas Palmer* doth hereby, for himself, his heirs and assigns, covenant, promise, grant, and agree to and with the said *Amos Palmer*, his heirs and assigns, in manner following; that is to say, that upon the death or failure of the aforesaid lives of the said *James Henry Palmer* and *John Palmer*, or any of them which shall first happen, and upon his the said *Amos Palmer*, his heirs or assigns, within six calendar months next after the failure of such life, paying or causing to be paid to the said *Thomas Palmer*, his heirs or assigns, the sum of 5*l.* sterling, as a fine for each and every life which shall happen to die, and paying and discharging all rent and arrears of rent then to be due of the said premises, and nominating a new life of any other person to be put and inserted in the place and stead of the person so happening first to die as aforesaid, the said *Thomas Palmer*, his heirs or assigns, shall and will add and insert to the time and term of this lease, the life of such other person so nominated in the place and stead of the persons so happening first to die as aforesaid; which life so to be added and inserted, is to be indorsed on the said lease, or to be written in a deed, label, or parchment, to be affixed thereto for that purpose in a

separate deed or writing, declaring the life or lives last failing, and the life or lives so added in lieu thereof, and the three lives in being during which the said estates shall be then to continue; which renewal is to be at the costs and charges of the said *Amos Palmer*, his heirs or assigns, and in like manner from time to time successively for ever, upon the failure of every other life or lives in this lease nominated, or hereafter successively to be nominated as aforesaid, and upon the like payment of 5*l.* as a fine upon the nomination of each and every life, and upon payment of all rent and arrears of rent to be due at the time of each renewal or renewals respectively, and upon the like nomination within six calendar months of any other life, in lieu of every life so failing as aforesaid; and that then the said *Thomas Palmer*, his heirs or assigns, shall and will within six months after the failure of every such life and lives nominated as aforesaid, add and insert to the time and term of this lease from time to time successively for ever, the several life or lives of such person or persons to be nominated in the place and stead of the life or lives of the several persons so happening to die as aforesaid; which several life or lives so to be added or inserted, are to be also indorsed on this lease, or written in deeds, labels, or parchments, to be affixed thereto, or in separate deeds or writings, but at the costs and charges of the said *Amos Palmer*, his heirs or assigns, as hereinbefore mentioned; it being the true intent and meaning of the said parties, that the said *Amos Palmer*, his heirs and assigns, shall, on the terms aforesaid, have a lease for three lives renewable for ever of the premises in being, on paying unto the said *Thomas Palmer*, his heirs or assigns, 5*l.* sterling for each and every renewal."

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Thomas Palmer had issue of his marriage one son, named *Thomas Palmer*, and one daughter, the Appellant *Mary*, and died intestate in the year 1805, leaving his son and daughter him surviving. *Mary Palmer* afterwards married the Appellant *John Clark*, and her undivided moiety of the lands of *Tubrit* was conveyed to uses, and amongst others to his use for life. By a deed of partition executed by her brother, the whole of the lands of *Tubrit* were allotted to the Appellants, subject to the uses of their marriage settlement. The Respondents claimed under the first lessee, *Amos Palmer*, and on the death of one of the lives in the first lease had applied for a renewal. The application was refused, and they then filed a bill to compel the execution of a renewed lease on the terms contained in the first lease.

The cause came on to be heard on the 28th day of *May* 1839, before the Lord High Chancellor of *Ireland*, when his Lordship ordered that a case should be stated for the opinion of the Court of Common Pleas, and that the question should be, whether the indenture of lease and release, and the covenant therein contained for the renewal thereof, dated the 10th day of *November* 1783, were warranted by the leasing power contained in the indenture of marriage settlement, or indenture of lease and release, dated the 26th day of *June* 1781, and executed on the intermarriage of *Thomas Palmer* and *Mary Palmer*; and further directions were reserved.

A case was accordingly prepared and set down for argument before the Justices of the Court of Common Pleas, who, on the 22d *May* 1840, transmitted the following certificate: "This case has been argued before us by counsel, and we are of opinion that the indenture of lease and release, bearing date

the 10th day of *November* 1783, and the covenant for the renewal thereof therein contained, are warranted by the leasing power contained in the indenture of marriage settlement, bearing date the 26th day of *June* 1781, executed on the intermarriage of *Thomas Palmer* and *Mary Palmer*."

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On the 2d of *June* 1840, the cause came on again to be heard before the Lord Chancellor of *Ireland*, when his Lordship pronounced a decree in accordance with this certificate. The order directing the case, and the final decree of the Lord Chancellor adopting the certificate of the Judges of the Court of Common Pleas, were appealed against.

Mr. Pemberton and *Mr. Elmsley*, for the Appellants:—The lease here is in contravention of the power. The Court below put a curious meaning on the phrase "consistent with their interest," and held that it did not mean that the persons who made the leases should make such leases consistent with their own interest, but consistent with the interest of those who had the estate at the time of creating the power. Those lands that were held in fee simple at a fee-farm rent, were thus declared capable of being leased in fee by any person in temporary possession of them; other lands held for 999 years, were declared capable of being leased by such person for that term; and others again, which were held in fee for ever, were declared capable of being granted away for ever by the tenant for life.—[*Lord Cottenham*:—What meaning do you put upon those words?—The trustees under the settlement were in possession of the legal estate, and the intention was that no person who was in possession should, except by virtue of a power, have the right of leasing at all. The trusts of the term,

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which was limited to trustees, required that the term should be in the trustees till certain annuities were satisfied, and till the death of *Thomas Palmer*. Suppose this power to be vested in *Thomas Palmer*, who is not to have any estate except subject to the prior charges existing on the property: if he may exercise the power by granting leases not consistent with the estate he has, but consistent with the estate originally existing, he may alienate in fee. He would do that by virtue of the power, which would override all other interests. But if he did, how could the trusts be executed by the trustees? For here would be, according to the Court below, a power to alienate the whole of the land, while the prior trusts over that land, and the charges on it, still exist. Such a construction of a leasing power is absurd. The interest meant must be the interest of the person, and not the description of the interest in the property.

[Lord *Brougham*:—You contend that, in order to justify the construction put upon these words, they ought to be, “consistent with *the*,” and not, “consistent with *their*,” interest therein.]

That does make a difference, but even that will not justify the construction now put on these words. The interest, as such, is a legal estate in fee, which the tenant does not possess. The trustees may have the legal estate even after the death of the tenant for life, for they have to raise a sum of 1,500*l*.

[Lord *Brougham*:—Then you read it, “consistently with their interest when *they* shall respectively be in actual possession?”]

Certainly. Another objection arises upon the terms of the lease itself. The power requires that the lease should be in possession, not in remainder, reversion, or expectancy. But it is said that this must be read

subject to the phrase, consistent with the interest therein; that is, according to the Court below, consistent with the tenure of the land. But here again that construction is impossible to be applied; for it is not the same thing if a person holds a lease for three lives, to grant another lease for three other lives; such a lease would not be consistent with his interest, and would be bad. Again, each party who came into possession from time to time, was to have the power of leasing; and this was therefore necessarily to be a power of leasing in possession. But the lease here granted is not a lease in possession; it is a lease of a reversionary nature. It is a lease for three lives, with a covenant to grant a future lease (on the expiration of one of the lives) for three other lives; a lease at the old term and on the old rents. This is manifestly against the terms of the power.

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Another objection is, that the rent to be reserved on leases granted under the power, was to be the best yearly rent without taking any fine: here no such rent is reserved, and a fine is expressly stipulated to be payable.

Another objection is, that there is no mutuality here. There is no covenant on the part of the lessees to take. Now this case comes before the Court on a bill for a specific performance, and Equity only exercises its power to compel a specific performance when there is a clear and proper mutuality of interest and liability; the want of it here is an answer to this bill.

It was said in the Court below that *O'Brien v. Grierson* (a) is an authority for the construction here put upon the words "consistent with their interest." That point was not there expressly de-

(a) 2 Ball & B. 323.

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cided ; but if it had been, and if the same Lord Chancellor who decided that case, afterwards dismissed the bill in *Spunner v. Clark*, it would show that on more mature consideration he felt that he could not place much reliance on the opinion at which he had at first arrived, or that the two cases were different from each other. *Hackett v. Hobart* (b) was also referred to, but it does not appear to justify the purpose for which it was cited. The lands there were held under a lease for lives, renewable for ever. The tenant for life had power "to demise the same for any term or terms consistent with the estate or term for which the said estate, &c. shall be then held ;" and this was held to authorise a demise for three lives different from the lives in the head lease. But it was there doubted whether such a power would authorise a demise for three lives, with a covenant for a perpetual renewal. The doctrine in Lord *Stafford's* case (c) does not apply, for that was the case of a mere personal engagement. Great reliance was placed on the case of *Muskerry v. Chinnery* (d), where, under circumstances like the present, leases were held valid ; but it must be observed that the decision of that point was not necessary for the determination of the case in that instance, and that the Court of Common Pleas in *Ireland* had previously held those very leases to be invalid. The case of *Spunner v. Clark*, which occurred before Lord *Manners*, and depended on the very power now under consideration, is in point. It is not reported, but the facts are the same as here. There the tenant filed a bill to compel *Clark* to execute a renewal according to the terms of a lease said to be granted under

(b) 1 Jones, Exc. (*Ireland*) (d) Lloyd & Goold, Cas. Temp
 Reps. 288. Sugd. 185.
 (c) 8 Rep. 75.

this power. The answer to the suit was, that the lease was an invalid execution of the power; and Lord *Manners*, adopting that defence, dismissed the bill. The case therefore stands thus:—the authorities in favour of the validity of these leases are doubtful or inapplicable, while there is a positive decision of Lord *Manners* against them. Unless that case can be distinguished from the present on the mere ground of the difference between leases for lives and for specific periods, it ought to be taken as a decisive authority, by which this case must be governed.

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Mr. *Kelly* and Mr. Serjeant *Wrangham*, for the Respondents:—The first difficulty to be met by the Respondents, is that supposed to be created by the decision in *Spinner v. Clark*. The answer to that case is, that it is not in point. It was so treated by the concession of all parties in the Court of Common Pleas, when the present case was under the consideration of that Court. One distinction is manifest. In the former case, the timber had been demised in direct contradiction to the terms of the leasing power, which required that the lessees should not be dispunishable for waste. Now it is clear that such a demise, if valid, would have made the tenant dispunishable for waste under the provisions of the *Irish Acts* (e). As soon as this circumstance was made known to the Court of Common Pleas, it was agreed on all hands that that alone was sufficient to decide the case of *Spinner v. Clark*; and from that moment it was never mentioned either by counsel or by the Bench, in the discussion of the present case. Examining this case on its own circumstances, it is

(e) 5 & 6 *Geo.* 3, c. 17; and 23 & 24 *Geo.* 3, c. 39. See *Galwey v. Baker*, ante, Vol. VII. p. 379.

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clear that the leasing power has been fully complied with. First, take the matter of the fines: who was the person whom the settlor intended to have the benefit of the fines? The words in the power are, "the said *T. Palmer* the younger, and every other person to whom the estate is limited," may make leases.—[Lord *Brougham*:—You do not deny that the legal estate was in the trustees all the time.]—That does not affect the question: a settlor may vest the legal estate in one person, and give the power of making leases to another. He is the owner of the whole, and may divide it in what way he pleases. *Hackett v. Hobart* is a strong authority for the present decision. The covenant there for perpetual renewal was held a good execution of the power.—[Lord *Cottenham*:—How do you deal with the words by which the power here is created; a power to make leases for lives or years, &c. consistent with their interest therein?]—It is plain that one of the words of the sentence must be struck away, and another substituted; it is a literal inaccuracy. The word ought to be *the*, and not *their*. The settlor, at the time he settled these lands, held them under several different titles. That would make it reasonable that he should say that the leases might be granted according to the separate tenures by which the lands were held. The House will treat this power as it would treat an Act of Parliament, where there was a mistake of a word, that, if not corrected, would defeat the intention of the Act. But even if the word "*their*" is suffered to remain, still the true construction will be that which the Respondents contend for, and which the Court below has adopted. The meaning is not, consistent with his or their respective estates. In other cases, where such was the meaning of the settlor,

he has used the words, his or their use, or estate. If he meant the same thing here, he would have used the same words.

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Now as to the lease for lives. This is not a lease for the mere lives of *A.*, *B.*, & *C.*, and a mere covenant that it shall be continued for other lives: it is a lease for all three, with a covenant to continue it a lease for three lives. The habendum is to *A. Palmer*, his heirs, executors, administrators and assigns, for and during the lives of the three persons, and of all and every of them.—[*Lord Campbell*:—Then according to your argument this instrument would be sufficient to the end of time, merely on inserting new names to complete the three.]—It would; and the names so inserted would be lessees under the original demise.—[*Lord Cottenham*:—Is not a lease on payment, not of a fine at the time, but on payment of a fine on the happening of a certain event which must happen at some time or other, a granting of a lease on a fine?]
—It is not; *Tuffield v. Adamson* (*f*) is in point here. There a power authorised a tenant for life to make leases for lives renewable for ever, but prescribed that such should be made at the best improved value without taking fines, and it was held that a lease for lives renewable for ever, with fines payable on the renewal at the fall of each life, was conformable to the power; for, as it is there stated, fines upon the dropping of lives were considered by *Lord Mansfield*, in *Taylor d. Athyngs v. Horde* (*g*), as among the annual profits of an estate. This is not a lease in reversion nor expectancy, but a lease in possession; it is not a covenant to renew on the dropping of one life and the succession of another, for the habendum here shows that it

(*f*) 3 Law Recorder (*Ireland*), N. S. 156. (g) 1 Burr. 60.

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is at once given to them, their heirs and assigns; that it is in fact one lease, giving at once all the estate of the person granting. It is therefore a lease in possession, and these lessees take an estate in possession for any number of lives.—[Lord *Cottenham* :—Would such a lease be within the meaning of the power? The power is to grant leases for lives. Does not that mean lives in existence? Does it mean lives which would last as long as the world lasts?]—Why should not that be so? Under a general power to make a lease for years, a lease for 999 years has been held good. In the *Attorney-general v. Moses* (*h*), there was a power under an Act of Parliament as to certain land to be leased by the vicar, and with the consent of the vestry, for such term or number of years, and at and under such rent, reservations and payments as to him and them should seem meet. The vicar made leases for 999 and 1,000 years at proper but fixed rents, and these were by Sir *T. Plumer*, then Master of the Rolls, held to be good leases. That was an instance of an execution of a power of leasing for a very long period of years, exercised by one who could not have more than a life estate in the premises. That was a case in which, if anywhere, the objection now made as to the lease being consistent with the interest of the holder for the time being, would be an objection of substance; but there such an objection was not allowed to prevail. If the tenant for life may grant for any number of years, how can he be restrained to granting an interest limited within his own tenure?

The argument as to mutuality is the next which requires attention; for that which related to there being but an insufficient power of re-entry, has not

(*h*) 2 Madd. 294.

been pressed here. On the question of mutuality, Lord Chief Baron *Joy*, in *Muskerry v. Chinnery*, in giving his opinion to the Lord Chancellor of *Ireland* (i), said, "there is no such principle of law as that in every contract there must be that mutuality which is contended for here; and that in a lease, for every advantage given to the lessee, there must be a correlative advantage given to the lessor;" and he cited *Cardigan v. Montagu* (k), in confirmation of his view of the matter. It is clear that where there is not any specific restriction in the power itself, there is no restriction implied by the law on the person exercising it.—[Lord *Cottenham* :—Do you know any instance of a remainder-man being called on to do what it was impossible for the tenant for life to do?—There is no case precisely in point on that subject. What the remainder-man could be called on to do, would seem to depend on the question whether what he was called on for was contrary to the power, or to the general rules of law.

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Mr. *Pemberton*, in reply :—There is nothing to justify the execution of this power.

[Lord *Brougham* :—What sort of power is that which gives the tenant for life power to grant estates for years consistent with his own estate for life?]

It is said that the fines must be considered as annual rents; but *Taylor d. Athyns v. Horde* (l) does not say that. The reference to that case, for the purpose of proving that argument, is not justified by any one single thing appearing in the case itself.

(i) 2 Sugd. on Powers, App. No. 19, p. 625.

(k) Sugd. on Powers, (6th edit.), 430, App. No. 14 (8).

(l) 1 Burr. 60.

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Lord *Cottenham*:—The Appellant *Mary Clark* is a child of a marriage, and claimant through her late brother, the only other child entitled to the lands in question, under her father's marriage settlement. The Respondents derive their title under the lessee, to whom the Appellant's father granted a lease for lives, with a covenant for renewal; and the question is, whether the Appellants so entitled in remainder ought to be compelled by a Court of Equity to give effect to the provisions of this covenant. The lands were held by the settlor for lives renewable for ever; and the power under which the Appellant's father, the tenant for life, granted the lease, authorised a lease for any terms or number of lives or years consistent with his interest, in possession, and not in reversion, and reserving the best and most improved rent, without taking any sum of money or other thing by way of fine, and every lease to contain a clause of re-entry for nonpayment of rent.

The lease was for three lives, with a covenant that the lessor, the tenant for life, his heirs and assigns, should and would upon the death of any of the lives, and payment of a fine of 5*l.* by the lessee for each added life, insert a new life in place of the dropped life, and so keep up the lease for three lives as a lease renewable for ever.

The plaintiffs in the cause, the Respondents in the appeal, assume by their bill, as they necessarily must, that if they should be entitled to the benefit of this provision for renewal of the lease, they must obtain it through the Appellant, the remainder-man; for it is not pretended that the tenant, the lessor for life, granted any other legal estate under the power than for the lives named in the lease. The question, therefore, is one purely of equity, but it was sent by the Court of

Chancery in *Ireland* to the Court of Common Pleas upon a case ; and the Judges of that Court certified that the lease and the covenant of renewal, were warranted by the leasing power.

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Many objections were made to the lease which it will not be necessary to observe upon, because I am of opinion in favour of the Appellant's case upon the principal point. There are, no doubt, many cases in which the Courts of Equity have compelled remainder-men to carry into effect contracts into which tenants for life with a power have entered ; but those cases have, I apprehend, proceeded upon this principle, that the contract was to be considered as a defective execution of the power ; which, therefore, a Court of Equity was justified in making good against the remainder-man. But if this be the ground of those decisions, the first question to be considered here is, could the tenant for life himself have done what the remainder-man is called upon to perfect. It is a well-known rule that a lease under a power to lease for lives must be confined to lives in *esse*, as was decided in *Doe d. Wyndham v. Halcombe (m)*. The attempt, therefore, to extend the estate of the lessee for lives to be named after the death of non-existing lives, was not within the power. The tenant for life could not have created such an estate, and the remainder-man, therefore, cannot be bound to give effect to a covenant for that purpose. In *Taylor v. Stibbert (n)*, Lord Rosslyn, alluding to a case precisely the same as the present, says, the son would have had a right to decline performance of the covenant ; and Lord Redesdale, in *Crofton v. Ormsby (o)*, adverting to the case of *Taylor v. Stib-*

(m) 7 Term Rep. 713.
(n) 2 Ves. jun. 441.

(o) 2 Sch. & Lef. 599.

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bert, says that the covenant was not binding upon the son's estate. It appears, therefore, to me that there is no principle or authority for compelling the remainder-man to give effect to this covenant for renewal. But if the plaintiff's case had not been met by the objection that the estate and interest which the lessee claims against the remainder-man is larger than was authorised by the power, and more than the donee could himself have created, other objections to the provisions of the lease would have been equally fatal to the plaintiff's case. The power does not authorise leases in reversion, nor the taking of fines, but requires that the best rent should be reserved; which is incompatible with taking a fine. The donee, therefore, could not have granted a lease to commence after the expiration of any of the lives first named, nor could he have taken a fine upon granting any lease. But if this covenant be binding upon the remainder-man, the tenant for life has in effect secured to the tenant of the land a reversionary interest upon payment of a fine; all which would be in contravention of the intention of the settlement, and a fraud upon the power.

From the high authority by which this case had been decided, it deserved and has received the utmost attention in this House. But, for the reasons I have stated, I do not hesitate to express my opinion that the plaintiff is not entitled to the relief he prays, and therefore to move your Lordships to reverse the decree which has been pronounced below, and in its place to direct that the plaintiff's bill be dismissed with costs.

Lord *Brougham*:—My Lords, I entirely agree with my noble and learned friend When this case

was heard before your Lordships, the able argument at the bar was heard by my noble and learned friends and myself with all the attention due to the importance of the principle which it involved, and to the great authority of the Court below which had dealt with the case; and we certainly at the argument came to the opinion which my noble and learned friend has now stated, and made the ground of the motion which he has submitted to your Lordships: but nevertheless, it was deemed expedient, in regard not only to the importance of the question involved, but to the authority to which I have referred, that we should take time further to consider the case. We have so considered it, and the opinion we then formed has been confirmed, and not shaken, by that consideration.

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Lord *Campbell*:—My Lords, I entirely concur in the opinion that has been expressed by my noble and learned friends; and I merely feel it necessary to say that I do not yield to the argument that was urged at the bar in this case, that, instead of the covenants for renewal actually contained in this lease, there might have been at once granted a lease for 1,000 years. I apprehend that such a lease, under such a power, would be substantially an alienation, and would be a violation of the power, and consequently void.

The *Appellant's agent* requested to be allowed to state that the Appellant had actually paid the costs of the suit below; and he asked for an order for their repayment.

Lord *Brougham*:—Then he must be repaid; and he must not only be repaid those costs, but he must have his costs below. It is not a matter before us, but it follows quite as a matter of course. The decree

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is set aside which made him pay the costs in the Court below: if he has paid those costs, he must apply to the Court below to be reimbursed them.

(Ordered, that the order and decree complained of in the appeal be, and the same are hereby reversed: And that the bill of the plaintiffs in the Court below be dismissed, with the costs of the suit in the Court below: And that the cause be remitted back to the Court of Chancery in *Ireland*, to do further therein as shall be just and consistent with this judgment.)

1842:
August 6.
March 7.

THE General Convention of the ROYAL }
BURGHs OF SCOTLAND, and Others - } *Appellants.*

CHARLES CUNINGHAM and CARLYLE }
BELL, Esqrs., Conjoint Clerks to } *Respondents.*
the said General Convention - - }

Corporation.
Office.
Salary.

THE Convention of the Royal Burghs of *Scotland* exists under the authority of an Act passed in the reign of *James 3* (A. D. 1487). It consists of commissioners or delegates from the Royal Burghs, meet annually, declares the amount of money required for certain purposes to be raised by the various burghs, holds its sittings for two or three days, provides by annual vote for its expenses, and is then dissolved. Two persons were appointed conjoint-clerks of this Convention, and their appointments were declared to be "with benefit of survivorship," and "with survivancy to the longest liver of them;" and the office was given to them "as freely and fully as any of their predecessors had held it;" and the emoluments were declared to belong to one of them "during his natural life;" the other was to have the benefit of survivorship. The Convention in one year raised the salary of its clerks, in another, it lowered that salary below its original amount, and it also increased their duties. There were instances of express appointments "during pleasure," and of dismissals.—

HELD by Lords *Brougham* and *Cottenham* (Lord *Campbell* dissenting): first, that this was not a life office; that the expressions in the appointment were explained by the circumstances under

which it was made; and, secondly, that the salary might be raised or lowered at the pleasure of the Convention.

Per Lord *Campbell*:—The Convention of Royal Burghs is a corporation: on the facts of this case, and the terms of the appointment, the office is granted for life, and the Convention cannot reduce the salary below its ancient and original amount. But the Convention can reduce it to that amount, and may perhaps cast new duties on the officers.

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THE General Convention of Royal Burghs of *Scotland* was first created by an Act passed in the 14th Parliament of *James 3* (1487), c. 111, in these terms:—“*Item*, It is statute and ordained be the hail three estaites, that zeirly in time to cum certaine commissares of all burrows, baith south and north, conveene and gadder togidder ains ilk zeir in the burgh of *Innerkeithing*, on the morne after *St. James’ Day*, with full commission, and there to commoun and treat upon the weilfare of merchandice, the gude rule and statutes for the commoun profite of burrows, and to provide for remeid upon the skaith and injuries susteined within the burrows; and quhat burgh that compeirs not the said daie be their commissares, to paye to the coastes of the commissares five pound, and zeirly to have our souveraine lordis letter to distreinzie herefore, and for the inbringin of he samen.” Various other statutes were subsequently passed, by which different privileges were conferred on this meeting of the commissioners of the different burghs.

The Convention appears to have met yearly since the year 1552, and since the Union it has been especially necessary that it should meet annually, as it was empowered by the Act of Union to apportion among the burghs the amount of land-tax leviable from the estate of burghs. It seems to be essentially a representative body, possessing important legislative

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and executive functions, and acting in the capacity of a convention of estates, or general council, in matters of merchandise and commerce in which the burghs were concerned, and generally in questions connected with the regulation or interest of the different burghs. It was accustomed to claim an exclusive jurisdiction in all such cases, and its sentences have been final, and not subject to the review of any other Court.

What the Convention requires for its yearly expenditure is voted annually, and raised by assessment upon the different burghs. For these assessments the Act of *James 3*, above mentioned, confers on the Convention the right “zeirly to have our souveraine lordis letter to distreinzie herefore;” but they have not been accustomed for a long time past to enforce these summarily by letters of horning.

On the 13th of *July* 1808, Mr. *John Gray*, writer to the signet, who was the conjunct-clerk to the Convention along with Mr. *John Dundas*, writer to the signet, having resigned his office, the Convention re-elected him along with Mr. *Charles Cunningham*, writer to the signet, the present Respondent, to the office of conjunct-clerk jointly with Mr. *Dundas*, granting to Mr. *Gray* the fees, salaries, and emoluments of the office during his life, and to Mr. *Cunningham* the benefit of survivorship. The salary at that time paid to the conjunct-clerks was 25*l.* each, which appears to have been the sum paid to these officers for a long period.

At the meeting of the General Convention in *July* 1815, it was resolved by the Convention to raise the salaries of the principal clerks to 50*l.* each.

On the 9th of *July* 1816, the Convention appointed Mr. *Carlyle Bell*, in room of Mr. *John*

Dundas, deceased, to be conjunct-clerk along with *Mr. Cunningham* (a).

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In 1824, the Convention passed certain resolutions,

(a) The two appointments were in the following terms:—

“ 17th Act of Convention, 13th July 1808.

“ The same day there was read a resignation from *Mr. John Gray*, writer to the signet, conjunct town-clerk of *Edinburgh*, of his office of conjunct-clerk to the General Convention, agreeable to what he intimated yesterday; and the same having been accepted of, the preses moved that *Mr. John Gray* and *Mr. Charles Cunningham*, writer to the signet, conjunct town-clerk of *Edinburgh*, be elected into the office of conjunct-clerk to the Convention, jointly along with *John Dundas*, writer to the signet, with the benefit of survivorship: which motion having been seconded by the commissioner for *Perth*, and the roll having been called and the votes marked, it carried approve, by a majority of twenty-six to eight. Whereupon the said *John Gray* and the said *Charles Cunningham* were declared duly elected into the office of conjunct-clerk to the General Convention of the Royal Burghs, along with the said *John Dundas*, with survivancy to the longest liver of them the said *John Gray* and *Charles Cunningham*: and the Convention granted, and hereby grant, power to them, or either of them, to exercise the said office as fully and freely, in every respect, as any of their predecessors could or might have done, or which to the office of conjunct-clerk to the Royal Burghs of *Scotland* by law or custom does appertain; giving and hereby granting to the said *John Gray* the fees, salaries, and emoluments belonging to the said office, during his natural life. Whereupon the said *John Gray* and the said *Charles Cunningham* accepted of the said office, and gave their oath *de fidei administratione*, and qualified to Government by taking the oath of allegiance, and signing the same with the assurance.”

“ 5th Act of Convention, 9th July 1816.

“ The same day the preses acquainted the Convention that a vacancy in the office of conjunct principal clerk to the Royal Burghs had taken place, in consequence of the decease of *Mr. John Dundas*. The commissioner for *Glasgow* then proposed that *Mr. Carlyle Bell*, writer to the signet, and one of the conjunct town-clerks of *Edinburgh*, should be elected to fill the vacancy: which having been seconded by the commissioner for *Aberdeen*, the said *Carlyle Bell* was unanimously elected into the said office: and the Convention granted, and hereby grant, full power to him to exercise the said office as fully and freely, in all respects, as the said *John Dundas*, or any of his predecessors, could have done, or which by law or custom appertains to the office of conjunct-clerk to the General Convention of the Royal Burghs of *Scotland*; giving and granting to the said *Carlyle Bell* the whole fees, salaries, and emoluments belonging to the said office. And the said *Carlyle Bell*, being present, accepted of the said office; and having been sworn *de fidei*, he qualified to Government by taking the oath of allegiance, and signing the same with the assurance.”

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which increased the amount of the labour of the conjunct-clerks. No objection was at that time made by them to these resolutions, but they continued in the office of conjunct-clerks, with a salary of 50*l.* each, voted annually by the Convention, until the year 1834, when it was resolved to reduce the salary to the sum of 50*l.*, or 25*l.* each; and at the meeting in 1835, the Convention, resolving still further to curtail the expenditure, reduced the salaries of the clerks to the sum of 35*l.* in all.

The clerks, the present Respondents, then objected to the resolutions, occasioning the increase of duties and the reduction of salary; and in *December* 1835 instituted a suit in the Court of Session to have them annulled, as being *ultra vires* of the Convention. The first defence set up related solely to the mode of service of the process, and the question of who were the proper parties to the suit. The conjunct-clerks in 1836 avoided these objections by a supplementary summons. Several other proceedings were had in the Court below, and on the 22d *June* 1839, the Lord Ordinary having reported it for the consideration of the Court, the Lords of the First Division pronounced an interlocutor adopting the conclusions of the libel, and giving the Respondents the costs. This interlocutor was confirmed by another, on the 9th of *July* in the same year, by which the costs were taxed.

The appeal was against both these interlocutors.

Mr. *J. Stuart* and Mr. *S. Gordon*, for the Appellants:—The Respondents contend that the Convention is a corporation, and that the office must be considered a life interest: neither of these propositions can be supported. The Convention is not a corporation, and its clerks are not corporate officers: they are per-

sons appointed from time to time, as the occasions of the Convention require. A printed Act of 1581, c.119, cited in the Respondents' own papers, proves this to be the case. The expression there used is, "The Lords, seeing the Act authentically subscribed by the clerk of *that* Convention;" an expression which shows that each Convention had its own particular officers. The argument thus arising as to the nature of the appointment is confirmed by the forms of appointment used in 1654 and in 1666, and on other occasions, where the expressions "during their pleasure" are introduced. In the cases of Sir *W. Thomson*, Mr. *Young*, and Mr. *Roughhead*, the appointments are extant; and the first of them is "during pleasure," and the others "in the same manner" as the first. And it is further confirmed by a statement made in the Respondents' own case, that at a meeting of the Convention in 1712, that body directed its agent to pay "the salaries and gratuities following;" and it appears that the gratuity given in 1712 was not repeated in 1713. These facts show that the clerkship was not an office in the legal sense of that term, and that there was nothing like a custom time out of mind to give it a settled salary. The Convention met but once a year; the nature of the duties to be performed would vary with varying circumstances, and the emoluments would also change. In the instance of 1712, the clerk having had more than usual to do, or having done it more effectually than usual, received a vote of a gratuity; but it is to be observed that the money was voted to the individual for his "extraordinary pains," and not to the office. The Convention is not a corporation; it cannot be enfeoffed of lands; it is an annual body, and meets by virtue of a commission, which exists only for the year. The business of the Convention does not

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occupy it more than two or three days; and at the end of each meeting the declaration is made "that the present Convention is dissolved."

[Lord *Cottenham*:—Is there any instance where the same persons, after the passing of that resolution, have met again within the same year?]

There is not. The Convention has no powers to levy money: the amount of the land-tax to be paid by the boroughs is declared by the Convention; but when the gross sum to be raised has been thus settled, there is a particular officer to fix the assessment for each borough. In no respect, therefore, does his body possess the ordinary characteristics of a corporation.

[Lord *Campbell*:—Suppose that this is not a corporation, what remedy would the clerks have for the salary that is assigned them?]

The individuals of the body would be liable for it. The persons here must be considered as a voluntary society. The Act of *James 3*, passed in 1487, shows that to be the case. It empowers the persons representing the four Royal Burghs to meet and propose matters to the Parliament, which, by the Parliament, are to be turned into Acts. That does not show the Convention to be a corporation. There is here no perpetual succession; an incident absolutely essential to the existence of a corporation. The representatives or delegates of corporations are not therefore necessarily corporations; and the form in which the Appellants have appeared in the Court below, does not in the least degree prove that they possess the corporate character. The words of the appointment granting the appointees "all fees," are not sufficient to show a corporate office to be held by them. They do not show the nature or tenure of the office, but merely point out the right consequent on the holding of it. This is proved by the case of Mr. *James Roughhead*,

who was appointed clerk to the Convention “during pleasure,” but to whom the same grant of “fees and immunities” was made. *Annan v. Farish* (b) is no authority here. The Court there assumed the existence of a universal law as applicable to boroughs, and the decision went on that assumption. Such an assumption would be utterly unjustified in the present case. Again, the Act of Parliament 5 *James* 3, c. 20, expressly directs that “all officers of the town shall be chosen yearly.” A town-clerk is an officer of the town; he cannot therefore be appointed for life, but must be chosen yearly. There is no express appointment for life here, and it is clear, from these cases, that such an appointment cannot necessarily be implied; and if not necessarily, will not be implied at all. As to the salary, it is clear that the same authority which could raise it, could also lower it. If that should not be admitted, it would follow that the salary must for ever remain the same.

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The *Attorney-general* and Mr. *Maconochie*, for the Respondents:—The words of the appointments here are conclusive against the Appellants. In the first, the right of survivorship is expressly mentioned; and in the other the appointee is to have all the rights and all the fees of his predecessors. The question whether this convention is a corporation, must not be tried by the strict law of *England*. A corporation cannot appear as such in an *English* Court, without letters patent. That is not the case in *Scotland*. The Corporation of Advocates, and the General Assembly of the Church, are instances of this.

[Lord *Campbell*:—I doubt whether your instances support your proposition.]

(b) 15 Shaw & D. 107.

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There are besides certain parties who have the right of appearing as corporations, that are not so in fact. The Attorney-general here can do so, but he is not a corporation.—[Lord *Cottenham* :—He appears not as a corporation, but in virtue of being an officer acting for the Crown.]—The Convention was established by virtue of the highest authority in the realm ; and the terms of the appointment, and the powers it is to exercise, show that it must have the rights of a corporation. It is an immemorial corporation.

[Lord *Campbell* :—Do you say that, by the law of *Scotland*, immemorial does not mean the time of *Richard* 1, but a very long time back ?]

That is so. The case of Sir *W. Thomson*, who was in 1666 a conjunct-clerk of this Convention, may be referred to as that of an appointment made “ during pleasure,” those words being found in the instrument of his appointment ; but it is curious that he was removed from his office, and was so removed, not capriciously, but on cause proved. This office is like that of a town-clerk, which, no matter what may be the words of the appointment, the Courts have always held to be a life office ; *Simpson v. Todd* (c). As to the salary, it does not follow that because it may be raised, it may also be reduced. To raise it is to make a new contract ; both parties are agreed upon that : to reduce it is to make a new contract, which cannot be done without the concurrence of both parties. The same principle may be applied to the question as to the increase of the duties imposed on the Respondents. The salary cannot be diminished, the duties cannot be increased, without their consent. There is not, in the long history of the existence of this Convention, one instance of a clerk dismissed, or of the salary of a clerk diminished. The

General Assembly of the Church is annually dissolved in the same way as this Convention ; but that Assembly has clerks who hold their office for life. The same observation may be made as to the House of Commons. Many of the officers of that House are appointed for life ; yet the House itself is periodically dissolved, and a perfectly new House constituted. Both these instances show that bodies not permanent in themselves may yet have permanent officers.

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Mr. *Gordon*, in reply :—The General Assembly and the presbytery are not like this Convention. They continue in virtue of a permanent right, but here different individuals are commissioned from time to time ; the right to issue the commission being the only thing that is permanent, and the Convention is dissolved every year. In the other bodies, vacancies occasioned by death are regularly supplied. There is nothing here to show that such is the case here, or that the Convention is more than a body of persons temporarily delegated to perform a certain duty, and ceasing to have any authority, or even any existence, the moment that duty is performed.

[Lord *Brougham*:—Suppose that some of the parties now composing this body were to die, would not the appeal survive, not only against those who are now parties to the suit, but against their successors ?]

If it did, that would not show that these persons constituted a corporation : other considerations would regulate that matter.

Lord *Brougham* :—This was an action of reduction and declarator, brought by the Respondents, to set aside a resolution of the Appellants reducing their

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salary as clerks of the Convention, and to have it declared that they held their office for life, and that the Convention had no power to increase or change their duties, any more than to alter their salaries. Mr. *Cunningham* had been appointed in 1808, with Mr. *John Gray*, to be together conjunct-clerk with Mr. *John Dundas*, "with benefit of survivorship," and "with survivancy to the longest liver of them" (*Cunningham and Gray*.) There was added the very usual clause giving them the office "as freely and fully as any of their predecessors had held it;" and further, the emoluments were declared to belong "to *Gray* during his natural life." In 1816, Mr. *Bell* was appointed to succeed Mr. *Dundas*, and to hold the office "as fully and freely as *Dundas* or any of his predecessors could have done."

The salary was raised in 1815: having for above 40 years before been 25*l.* for each clerk, it was now doubled; that is, when *Cunningham* was elected the salary was 25*l.*, when *Bell* was elected it had become 50*l.*; and the interlocutors appealed from declare not only that the Convention had no right to lower Mr. *Cunningham's* original salary, but that they had no right to take off the addition which had been made in 1815, from him, any more than from Mr. *Bell*, who had been elected after that increase. So that, according to this decision, if any addition should ever on any account be made to the salary of the office, as in respect of additional trouble, this addition could never be taken off, even if the trouble which occasioned it should entirely cease.

Such a position seems to be wholly untenable. Accordingly, the Lord Ordinary, in his report of the case to the Court, plainly gives his opinion that there is a great difference between the salary added in 1815,

and the former salary ; and he holds this difference to exist in *Bell's* case as well as in *Cunningham's* ; not deeming it a matter of contest between *Bell* and those who appointed him, but regarding the question as turning upon the right of both to the office and its emoluments, as fixed by the ancient usage and enjoyment of the office. The Convention is a body authorised and regulated, though it might not be created, by the statute of *James 3* (1487), c. 111, and it is appointed to meet yearly on the morrow of *St. James*. It consists of commissioners or delegates from the Royal Burghs, and has the regulation of matters of trade within a narrow sphere compared to what it formerly had. The meeting of the Convention seems never to have continued above three days, and of late years never above two. At each meeting it is not adjourned or prorogued, but dissolved, though a very few instances are to be found of intermediate proceedings. The business is very little in point of labour or importance, and the trouble of the clerks is proportionately small.

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A body so chosen, and of a kind so peculiar, can with difficulty be compared to a corporation ; and it is also with difficulty that we can arrive at the conclusion that it should have the power of conferring an interest for life on any of its officers. The House of Commons, to which it has been compared in argument, and in order to show that a representative body may have officers whose tenure depends not on its own existence, can hardly be considered as affording an appropriate example ; for certainly no officer chosen by the House has any existence beyond a dissolution. The clerks of the House are appointed by the Crown ; the Speaker, indeed, is chosen by the House, but he is chosen each Parliament.

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However it is unnecessary to inquire whether or not a body such as the Convention may or may not appoint to offices for life. A long and clear usage may possibly show that this power exists, and that the office-bearer chosen by a body of delegates who are themselves only called into existence for two days once a year, and at the expiration of these two days cease to exist, hold their places for their own lives. It is conceivable, though barely conceivable, that—the whole burghs being corporations of continued existence—this convention of their delegates may be an incident to the corporate existence of the several individual burghs, or may be something growing out of that corporate existence, and may have the power in question. Such an anomalous thing may perhaps be conceived. But at least it must be admitted that clear proof of this by long usage must be given, else the probability is that such a body only chooses its officers occasionally, or at least continues them from meeting to meeting as long as it pleases; and though it may not each time elect them anew, the likelihood is that the former nomination is assumed to continue as if a new one had taken place until there be a new appointment.

But this question does not necessarily arise here. At least the main question meant to be raised, as to the right of lowering the salary, may be disposed of without determining whether the clerks are removable or not; and the clerks may be removeable by declarator, without being liable to dismissal at the mere caprice of the Convention. As however there is a declaratory conclusion in the summons that the offices are for life, and as the Court has found in terms of that conclusion, we must observe that there seems really no sufficient ground for holding that the

office is a life interest. The usage seems to be the other way.

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In 1654, Sir *William Thomson* is appointed "during their pleasure." In 1666 the delegates of the burghs remove him for neglect of duty, reciting that he held his office "during their pleasure allenarly," and that they could declare the place vacant as often as they found it meet and expedient for their affairs. *Thomson* had been removed from his other office of town-clerk of *Edinburgh*, and he resisted this removal successfully in the Court of Session. But he acquiesced as to the dismissal from the place of clerk of the Convention.

Young, the successor of *Thomson*, was elected in like manner during pleasure, and held the office till 1669, when *Roughhead* was chosen in the same terms.

There are no instances of any other appointment produced until we come to that of Mr. *Dundas*, which is assumed by the Lord Ordinary to have been for life; but the papers do not in any one part afford anything like precise evidence of what Mr. *Dundas's* appointment was. The only reason for supposing that he had been appointed for life is to be found in the expression "with benefit of survivorship," which occurs in Mr. *Cunningham's* appointment. But this is quite inconclusive; for it may only mean that *Gray* and *Cunningham* shall, while *Dundas* lives, be together joint-clerk with him, and that after his decease they shall be the two clerks, without any successor being appointed to *Dundas*. Such a clause was quite consistent with the fact that none of the three held for his own life. It is said that *Bell* was to hold the office on the same terms with *Dundas*. This construction of the gift made it of primary importance to ascertain the tenure of *Dundas*. But this is not done other-

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wise than by referring to the equivocal clause of survivorship. But it is by no means clear that the words imply the identity of the tenure; they rather relate to the exercise of the office. He (*Bell*) "is to exercise the said office as fully and freely in all respects as *John Dundas* could have done, or which by law or custom appertains to the office of conjunct-clerk." There is evidently here not an elliptical expression, but apparently an omission of certain words; for it says, "to exercise the said office as freely and fully in all respects as *John Dundas* could have done, or which to the office of conjunct-clerk." It must mean, "and to do things, or to receive emoluments, or to hold rights, which to the office of conjunct-clerk of the Royal Burghs of *Scotland* by law or custom does appertain."

The clause respecting *John Gray* has also been much relied upon, but it is liable to the observation made respecting the clause of survivorship. Indeed it is, when rightly considered, a provision for survivorship. *John Gray* was in the office. It was not intended to remove him, but only to add *Cunningham* to him as joint conjunct-clerk, in such manner that they two should be one clerk, with *John Dundas* as the other, and that whichever of the two outlived the other should be the sole colleague of *John Dundas*. But the whole emoluments of the conjunct-clerk were to be *John Gray's*. In other words, he was an elderly man, and Mr. *Cunningham* was to be his successor, leaving the fees to him, *John Gray*, for his life; that is, the Convention had no intention of removing him while he lived. But if this clause should be held to give *John Gray* a life interest which he had not before (a very erroneous construction), or to prove that he had before a life interest; it shows nothing as

to *Cunningham*, nay it rather would exclude his claim to such an interest. The claim of survivorship between him and *Gray* plainly proves nothing ; but for that clause *Cunningham*'s office would have ceased upon *John Gray*'s death. It was only meant to continue him, notwithstanding *John Gray*'s decease.

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It is not to be denied that the leaning of the *Scotch* law is towards affirming the interests of office-bearers in their offices, preventing summary ejectments without proceeding to declare the place vacant ; and rather taking hold of circumstances to show that the party is not removeable without fault, than leaving him so removeable. Nevertheless, there must be something to show that an office, which in its own nature appears to be one held during pleasure, is given for life. Where a body exists in the way we find this Convention constituted,—a yearly meeting for two, or at most three days, of persons chosen only to attend such meeting, and then to cease holding any functions, falling back, as it were, into the several bodies which had deputed them for the special occasion,—the last thing we naturally expect is that such a meeting should appoint office-bearers for life. Nothing but a continued course of proceeding can make us suppose that such is the nature of the office ; and in this case that course appears to be wholly wanting.

Reference has been made to cases for the purpose of showing that such offices must be for life, or it is possible it is only meant that they are for life unless the contrary be proved. These cases certainly prove nothing of the kind ; what is laid down in the case of town-clerks seems to proceed upon the nature of the office, which the Court of Session has held to require a tenure other than during pleasure.

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The strongest case is that of *Simpson v. Todd* (*d*), in which the Judges said that the public duties of the office were important, and required the holder "to be under no apprehension of being liable to dismissal at the pleasure, perhaps at the caprice, of the town council;" and hence they rejected the words "during pleasure" in the appointment, as incompatible with the nature of the office. It is singular that the much higher office of Judge in the Supreme Court should in the same country have been held always during pleasure, even after it had ceased, and it only ceased by statute, to be so holden in *England*.

But when the case of *Annan v. Farish* (*e*) came before this House by appeal, the judgment of the Court below, which proceeded only on the possessory question, was affirmed, with an alteration expressly made to show that no opinion whatever was pronounced upon the tenure of the office. Indeed that judgment below, although containing words liable to misconstruction, and which were therefore struck out here, had also an express reservation of any right which the Appellants might have to bring an action of reduction for setting aside the appointment.

When the Respondents in the present case rely on prescription, they must rather mean something analogous to prescription, such as long usage: for certainly it is not easy to see how the emoluments of an office held by personal election or nomination, can be the ground of prescription. In all the cases to which reference is made, either in this discussion or by text writers who mention fees of office as capable of prescription, the offices appear to be of an hereditary description, and so feudalised, or *quasi* feudalised; as

(*d*) 3 Shaw & Dunl. 150.

(*e*) 15 Shaw & Dunl. 107.

almost all offices, and indeed almost everything else, became in process of time all over *Europe*, under the feudal system.

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Thus the cases cited by *Erskine* to prove this position, *Sheriff of Galloway v. Cassilis* (*f*), *Douglas v. Jedburgh* (*g*), and *Callender v. Stirling* (*h*), were the cases of heritable sheriffs; and the first of them was a question respecting a servitude claimed in right of a landed estate possessed with the servitude time out of mind. So too *Cunningham v. Eglinton* (*i*) was the case of the heritable sheriff of *Renfrewshire*; which grant being "*cum feodis*, &c." the Court held "sufficient to ground a prescription." *Ringhorn v. Forfar* (*k*) was the case of a heritable constable; *Murray v. Moss* (*l*) was the case of a heritable sheriff; and *Hatter v. Dundee* (*m*) was a question between an heritable constable and a corporate town; and no one can doubt that owners of such property may validly prescribe for the emoluments belonging to it.

That a body like the Convention, by continuing to pay not to one clerk, but to successive clerks, for 40 years, a certain salary, thereby gives not to one individual but to every clerk who may ever after be employed, a prescriptive title to the same salary, appears to be a proposition neither consistent with the nature of such office, nor of title by prescription. The judgment below therefore appears to me, according to the best opinion I have been able to form upon this subject, to which I have certainly paid considerable attention, unsupported by the facts of the case, and

(*f*) 11 March 1634.
(*g*) 18 July 1660.
(*h*) 11 July 1672.
(*i*) 27 December 1709.

(*k*) 18 July 1676.
(*l*) 13 December 1677.
(*m*) 9 December 1679.

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 CUNNINGHAM. irreconcilable with any legal principle; and I should recommend to your Lordships that it be reversed, and that the Appellants (the defenders below) be assoilzied from the conclusions of the summons, with the costs below.

Lord *Cottenham* :—My Lords, I entirely concur in opinion with my noble and learned friend. The interlocutor appealed from is according to the conclusion of the summons. It therefore declares void the order of the Convention for reducing the salaries of the clerks. It declares that it is *ultra vires* of the Convention to add to the duties of the clerks, or to reduce their salaries of 100 *l. per annum* between them; and it declares that the clerks have a vested life interest in their office, and in the fees, salaries, and emoluments thereof, and that each of them is entitled to a salary of 50 *l.* for each succeeding year of his life.

Before adverting to the debateable ground of the appeal, I cannot but observe that it is only since the 11th of *July* 1815 that the salary has been of the present amount, when it was raised from 25 *l.* to 50 *l.* by the voluntary act of the Convention, at which sum it has since been continued by annual vote; and that the only act adding to the duties of the clerks is that of the 15th of *July* 1824, which abolished the office of recorder, and threw the duties of it upon the clerks, in which they have ever since acquiesced, and they do not by the present action seek to be relieved from the effect of that order.

The pursuers have attempted to support their case, and the interlocutors appealed from, by insisting, first, that the General Convention of the Royal Burghs of *Scotland* is a corporation; secondly, that the office

of clerk is an office for life; and thirdly, that the salary is attached to and constitutes part of the office, and therefore is held for life also.

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Another point was raised at the bar, namely, that the pursuers were entitled by contract to the salary of 100*l. per annum*; but this I put out of the subject-matter for consideration, because there is neither any allegation in the summons, nor any proof to support that proposition. I proceed, therefore, to consider the above three points.

If the pursuers should be found to have failed in any of these three points, their whole case must fail. I think they have failed in all three. But having formed a very decided opinion upon the two last, I abstain from putting my decision upon the first.

The term "corporation" is certainly used in a much more extended sense in *Scotland* than in this country; possibly, therefore, the term may, consistently with usage in other cases, be applied to the Convention; but when a question arises as to the powers and liabilities of the body, which must depend upon its continued existence and other qualities incident to a complete corporation, the nature and qualities of the body, and not the term by which, in the looseness of language, it may have been designated, ought to be the subject of inquiry. In such a case the term "*quasi* corporation" is much too indefinite upon which to found any conclusion.

If it was necessary to give a decided opinion upon the first point, we must consider how a body of men appointed for a particular purpose, and whose meeting is declared to be dissolved when that purpose is effected, can be considered as a corporation in that sense which is necessary to enable them to bind by

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contract those who may in a subsequent year be appointed for a similar purpose.

The second point, whether the office of clerk be an office for life, unless decided by a negative of the first proposition, must be matter of evidence applicable to the particular office; for no aid can be derived from decisions that town-clerks and other officers, having recognised public duties to perform, have a freehold in their office.

From the offices held by the pursuers, they must be supposed to have access to all the evidence capable of being produced upon this subject; but they have not produced any one instance of a grant of the office for life. All the instances that have been produced (and some are of an early period) are expressed to be "during pleasure," or, "as fully and freely in every respect as any of their predecessors could or might have done, or which to the office by law or custom does appertain;" which appears to have been the more modern form, and which, by referring to the former appointments, which were during pleasure, must have the same construction as if those words had been actually used, instead of being merely adopted by reference.

The appointment of 1808, under which Mr. *Cunningham* holds the office, was said to be an exception, and it was argued that it amounted to a grant to him of the office for life. I think it is plain that this is not the true construction of the appointment. The object was to secure to Mr. *Gray*, the old clerk, the emoluments of the office, and to procure for him the assistance of Mr. *Cunningham*, who, in consideration for such unpaid assistance, was to succeed Mr. *Gray*. The two therefore were appointed in the usual form; that is, to hold the office as fully and freely as their

predecessors, that is during pleasure, with survivancy to the longest liver of them ; which was necessary to continue the office to Mr. *Cunningham* after Mr. *Gray*'s death. And then, in order to carry the arrangement between the parties into effect, the fees, salaries, and emoluments belonging to the office were granted to Mr. *Gray* during his natural life. This could not affect the nature of the office itself, but was introduced only to provide that Mr. *Cunningham* should not receive any of the emoluments of the office so long as Mr. *Gray* lived ; and at most it regarded only Mr. *Gray*, and had no reference to the appointment of Mr. *Cunningham*. It appears to me therefore that the second proposition, that the office was for life, is not only not established, but that the evidence proves that it has at all times been an office during pleasure only. But thirdly, supposing the office to be for life, the pursuer had to prove that the salary in question was incident to the office. The question is not one of fees or perquisites, but of annual salary, which was raised from 50*l.* to 100*l.* in 1815, and which had been regulated by an act of the Convention in 1713. Before that time the emoluments of the clerk were 40*l.* ordinary salary, and 20*l.* gratuity ; and in that year the Convention directed its agent to pay 50*l.* salary for the future, in lieu of all gratuity ; and the salary, so varied from time to time, and contended to be part of a salary incident to the office, appears, upon investigating the proceedings of the Convention, to be the subject of an annual vote of the Convention, which annually continued the tax-roll and establishment to the following year.

The Convention having no property wherewith to pay its necessary expenses, what is so annually voted raised by an assessment upon the different burghs ; if it were necessary to go so far into the case, it

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would be difficult for the pursuers to show how the right to which they are declared entitled by the interlocutors appealed from, could be enforced; which is in many cases no bad mode of trying the validity of an alleged right. It is, however, sufficient for the present purpose to say that it appears to me that the right of the clerk to the salary exists only in the vote, and does not extend beyond the period embraced in the vote.

For these reasons, it appears to me that the pursuers have failed in the ground upon which their case depended; and that the interlocutors appealed from ought to be reversed, and the defenders assoilzied from the conclusions of the libel, with expenses.

Lord *Campbell*:—My Lords, I am extremely sorry that, in this case, I cannot agree with my noble and learned friends who have preceded me. I do not, on the one hand, think that the interlocutor of the First Division of the Court of Session can be supported to its full extent; but on the other, I cannot concur in the proposed judgment simply to reverse that interlocutor, with a decerniture that the defenders should be assoilzied from all the conclusions of the libels in the original and supplemental actions;—the consequence of which would be that the pursuers may at any time be dismissed from the office they hold, or their salary may be reduced to a nominal amount.

In the first place, I can entertain no doubt that, by the law of *Scotland*, the convention of Royal Burghs is a corporation capable of appointing officers, and of suing and being sued.

This body has existed from the most remote times; it has very important functions in the regulation of trade; it has the power of taxation; and although of

late years it has only sat two or three days in a year, there is no reason why it might not sit throughout the year, or at any periods when occasion might require. It therefore seems to me to be very much in the nature of the municipal corporations with which we are so familiar. As to its being capable of suing and being sued, there are repeated instances of its having brought actions, and of actions having been brought against it, without its power of suing and being sued ever having been called in question.

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Secondly, it is proved that the office of clerk has existed as an office under the corporation from the remotest times, with fees and emoluments belonging to it. It is not disputed that the pursuers were duly appointed to this office; but a great question arises as to their tenure of this office. My opinion, formed after the best consideration I have been able to bestow upon the subject, is that they hold it *ad vitam aut culpam*. I do not by any means yield to the argument that, from the nature of the office, it must necessarily be held for life or during good behaviour. I do not think the authorities show that before the *Scotch* Municipal Corporation Act, the town-clerk of a burgh could not in any case be appointed yearly or during pleasure; and if there had been such a rule applicable to the town-clerk of a burgh, it would not necessarily extend to this office under the Convention of Royal Burghs. I look to the manner in which this office has been held, and particularly to the appointment of the pursuers.

Three instances appear in the 17th century in which the appointment was expressly *during pleasure*. Most of the other appointments appear to have been general, with power to exercise the office as fully as the predecessors of the party appointed had done, and with all fees, salaries, and emoluments belonging to

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the office. Under such appointments the clerks have enjoyed the office for life; and in the cases cited of the removal of Sir *William Thomson*, although misconduct was alleged, the order removing him begins in these words: "The Royal Burrows met in a General Convention, taking to their serious consideration that Sir *William Thomson* was elected clerk to the said Convention *during their pleasure allenarlie*, and that *thereby* it is in their power to declare the said place vacant so often as they shall find it meet and expedient for their service and affairs." The reason assigned for their being able to declare the office vacant is, that he was appointed "during their pleasure *allennarlie*." I think the fair inference is, that although the members of the Convention might appoint a clerk "*during pleasure allennarlie*" if they chose, a general appointment by them was to be construed an appointment for life.

But Mr. *Cunningham's* appointment I consider for life by express words. On the 13th of *July* 1808 an appointment was made in the following terms: "There was read a resignation from Mr. *John Gray*, writer to the signet, conjunct town-clerk of *Edinburgh*, of his office of conjunct-clerk to the General Convention, agreeable to what he intimated yesterday; and the same having been accepted of, the preses moved that Mr. *John Gray* and Mr. *Charles Cunningham*, writer to the signet, conjunct town-clerk of *Edinburgh*, be elected into the office of conjunct-clerk to the Convention, along with *John Dundas*, writer to the signet, with the benefit of survivorship: which motion having been seconded by the commissioner for *Perth*, and the roll having been called and the votes marked, carried approval by a majority of 26 to 8. Whereupon the said *John Gray* and the said *Charles Cunningham* were duly elected into the office of con-

junct-clerk to the General Convention of the Royal Burghs, along with the said *John Dundas*, with survivancy to the longest liver of them the said *John Gray* and *Charles Cuninghame*: and the Convention granted, and hereby grant, power to them, or either of them, to exercise the said office as fully and freely in every respect as any of their predecessors could or might have done, or which to the office of conjunct-clerk to the Royal Burghs of *Scotland* by law or custom does appertain; giving and hereby granting to the said *John Gray* the fees, salaries, and emoluments belonging to the said office, during his natural life. Whereupon the said *John Gray* and *Charles Cuninghame* accepted of the said office, and gave their oath *de fidei administratione*, and qualified to Government by taking the oath of allegiance, and signing the same with the assurance."

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Gray was appointed with all fees, &c. during his natural life. How he should be entitled to receive the fees during his natural life, unless he was appointed during his natural life, I confess I do not understand. *Gray* being appointed during his natural life, *Cuninghame*, the conjunct-clerk, was appointed along with him, "with benefit of survivorship," and "survivancy to the longest liver of them the said *John Gray* and *Charles Cuninghame*." I hardly know what language could more strongly have expressed the intention to appoint both for life; and it does seem strange to me to suppose that *Cuninghame* could have been discharged during the life of *Gray*; and still more so, that if he held during the life of *Gray*, he might be discharged upon his death, which hardly seems consistent with the benefit of survivorship.

The appointment of the pursuer *Bell* took place on the 9th of *July* 1816, and is thus recorded: "The

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preses acquainted the Convention that a vacancy in the office of conjunct principal clerk to the Royal Burghs had taken place, in consequence of the decease of Mr. *John Dundas*. The commissioner for *Glasgow* then proposed that Mr. *Carlyle Bell*, writer to the signet, and one of the conjunct town-clerks of *Edinburgh*, should be elected to fill the vacancy: which having been seconded by the commissioner for *Aberdeen*, the said *Carlyle Bell* was unanimously elected into the said office: and the Convention granted, and hereby grant, full power to him to execute the said office as fully and freely in all respects as the said *John Dundas* or any of his predecessors could have done, or which by law or custom appertains to the office of conjunct-clerk to the General Convention of the Royal Burghs of *Scotland*; giving and granting to the said *Carlyle Bell* the whole fees, salaries, and emoluments belonging to the said office. And the said *Carlyle Bell* being present, accepted of the said office; and having been sworn *de fidei*, he qualified to Government by taking the oath of allegiance, and signing the same with the assurance."

Here, while *Cunningham* held the office of conjunct-clerk for life, *Bell* is appointed as his colleague, "to exercise the said office as fully and freely in all respects as *John Dundas* or any of his predecessors could have done, or which by law or custom appertains to the office of conjunct-clerk to the General Convention of the Royal Burghs of *Scotland*." *John Dundas* does not appear to have been expressly appointed for life; but *John Gray* had been expressly appointed for life, and *John Gray* was one of the predecessors of *Cunningham*. For these reasons I think that both the pursuers were appointed *ad vitam aut culpam*.

But it is said, under the defender's third plea in

law, that the members of the Convention are fluctuating; that they are elected only for a short period; and that they cannot bind their successors by any such appointment. I do not consider that there is the slightest weight in this objection, which was so much relied upon in the Court below. The individual members of the corporation are fluctuating, and are elected for a short period of time; but the corporation itself, the *ens legis*, is perpetual; and the lawful acts which it does are binding upon it when the individuals through whose instrumentality the acts were done have ceased to be members. A municipal corporation would lose none of its powers or attributes, although by its construction all the members of the corporation should be elected for one year only.

If the pursuers have a freehold in their office, it follows that they cannot be deprived of the just emoluments of it, any more than they can be arbitrarily dismissed from it. Now I consider 50*l.* a year, to the two jointly, as the just emoluments of the office. A salary to this amount, in lieu of fees and perquisites, had been received by the conjunct-clerks for a period much longer than is necessary to give a prescriptive right, by the law of *Scotland*, before 1815; it was then raised to 100*l.* a year: but I do not think that the members of the Convention were precluded from again lowering it, at their discretion, to the ancient amount, if they thought that this was just, from a diminution of the business to be done, or any change in the times. The consequence would be, that the order of 1834, reducing the salary of Messrs. *Cunningham* and *Bell*, for discharging the office of principal clerk to the Convention, to 50*l.*, is valid and ought not to be disturbed; but that the order of 1835, reducing the salary to 35*l.* a year, is *ultra vires*, and

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should be declared void. This is the view of the case taken by the Lord Ordinary, with whom I entirely concur. But the first decision of the Court has gone much further, and “decreed and declared in terms of the original and supplemental libels;” the conclusions being that both orders should be rescinded, and that it should be declared to be *ultra vires* of the Convention to add to the duties of the pursuers without their consent, and that they are entitled to hold for life at a salary of 100*l.* a year.

I think the Convention cannot change the nature of the office; but it is possible that new duties, as conjunct-clerks, might lawfully be cast upon them.

My humble advice to your Lordships would have been to alter the interlocutor of the First Division: but I cannot wish that your Lordships should not be guided by the advice of my noble and learned friends, who are so much more competent to come to a right conclusion; and I presume, therefore, that the interlocutor must be reversed, with an *absolvitur* to the defenders on all the conclusions of the libel.

Lord *Brougham*:—My Lords, I take it for granted, that although my noble and learned friend differs from us on one part of the case, there will be no difference of opinion as to the costs; but that, if we reverse the interlocutors and assoilzie the defenders, they ought to have the costs below.

Lord *Campbell*:—Clearly.

(The Interlocutors were reversed, with directions.)

THE LORD ADVOCATE OF SCOTLAND,
in name and on behalf of Her
Majesty, and of the Commissioners
of Her Majesty's Woods and Forests } *Appellant.*

1841:
May 9.
1842:
Feb. 18, 21,
22, 28.
Aug. 2.

THE HON. COSPATRICK ALEXANDER
HOME, LORD DUNGLAS, and Cap-
tain ROBERT CUNNINGHAM - - } *Respondents.*
(1st Appeal.)

THE said LORD DUNGLAS and ROBERT
CUNNINGHAM - - - - - } *Appellants.*

HER MAJESTY'S OFFICERS OF STATE
FOR SCOTLAND, and the LORD AD-
VOCATE, on behalf of the Commis-
sioners of Woods and Forests - - } *Respondents.*
(2d Appeal.)

THE office of Chamberlain and Collector of revenues payable to the Crown out of *Ettrick* Forest, was granted by *Geo. 4.*, to Lord *D.* for his life, with a yearly salary, "as well in consideration of the office as out of Royal bounty and favour," to be paid out of the monies of the collection; and if they should be insufficient, out of the Crown revenues of other lands in *Scotland*. The salary exceeded the monies collected, and was paid out of them and the other Crown revenues, for several years after the demise of *G. 4.*—
HELD, that the grant, under disguise of a grant of an office, was in reality a grant of a pension, to endure beyond the life of the Royal grantor, and was so far an illegal alienation of the Crown property. (*Infra*, p. 215.)

*Powers
and Preroga-
tives of the
Crown
Grant of an
Office for life
of Grantee.*

- Semble*, 1. That the Officers of State in *Scotland* are the proper parties to pursue an action to set aside an illegal grant of the property of the Crown in that country. (pp. 178. 213.)
2. That such an action brought by the Lord Advocate in name and on behalf of the Crown, without a special warrant, is incompetent, although he obtains such warrant in the course of the proceedings. (pp. 178. 213.)
3. That in such action the Lord Advocate and the Commissioners of Woods and Forests have no title to sue. (pp. 178. 213.)

*Title to sue.
Officers of
State.
Lord
Advocate.
Commis-
sioners of
Woods and
Forests.*

- Practice.* Where the Crown, by any of its officers, is a party Respondent in an appeal, it is not the usage of the House of Lords to allow the Counsel for the Crown a general reply, after the reply for the Appellant. (*Infra*, pp. 199, 200.)
- Reply.*
- Counsel for the Crown.*
- Costs.* The Lord Advocate of *Scotland*, or other officer of the Crown, suing on behalf of the Crown, or in matters in which the Crown is interested, is not liable to pay costs to the opposite party, even though the suit may have been improperly instituted. (pp. 184. 201-213.)
- Competency of Appeal.* Against any judgment awarding such costs an appeal may be brought, notwithstanding the general rule that no appeal lies for costs. (pp. 184. 201-213.)
- Recognizances.* And the Lord Advocate or other officer of the Crown, bringing that appeal, is not required to enter into recognizances to answer the costs of the appeal. (pp. 184. 201-213.)

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THESE appeals were brought against several interlocutors of the Court of Session in *Scotland*, in two actions instituted there, in different forms, but with the same object; namely, to rescind a grant made to Lord *Dunglas* of "the office of Chamberlain and Collector of the rents, revenues, feu-duties, and other casualties of superiority payable to the Crown out of the lands and lordship of *Ettrick* Forest, in the Shire of *Selkirk*, part of the hereditary revenues of the Crown of *Scotland*."

That office becoming vacant by the death of Mr. *Alexander Pringle* in the year 1827, was then granted to Lord *Dunglas* for his life by King *George* the Fourth, by commission under the great seal of *Scotland*, issuing on a warrant under his Majesty's sign manual, dated the 27th of *July* 1827, with power to appoint a deputy or deputies to collect and account for the said revenues to his Majesty's receiver-general in *Scotland*. "And his said Majesty, as well in consideration of the said office as out of his Royal bounty and favour to the said Lord *Dunglas*, granted to him a yearly salary of 300 *l.* sterling, and 20 *l.* sterling to his deputy or deputies; both salaries to be paid during the life of Lord *Dunglas*, out of the monies of

the said collection ; and whenever they come short, out of the first and readiest of the rents, revenues, &c. payable to the Crown out of the lands and lordship of *Dunbar*." Mr. *Pringle* had 500*l.* a year.

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Lord *Dunglas* having entered on the office by virtue of this commission, and found securities in the Exchequer for his intromissions, according to the usual practice, appointed Captain *Robert Cunningham* to be his deputy. They collected the rents and revenues of *Ettrick* Forest, duly accounted for them in the Exchequer, and received their respective salaries, from the time of their appointments, without interruption or question of their rights, until the year 1834. The annual amount collected by them during that time was 235*l.*; the difference between that sum and 320 *l.*, the amount of the salaries, being paid to them, according to the terms of the grant, out of the revenues of the lordship of *Dunbar*. The attention of the House of Commons was drawn to the subject in 1834, after the passing of the Act 3 & 4 *Will.* 4, c. 69, hereinafter mentioned ; and a resolution was passed directing the law officers of the Crown in *Scotland* to institute proceedings to set aside the grant.

Accordingly, in *May* 1834, an action of reduction was raised in the Court of Session against Lord *Dunglas*, who, in the terms of the summons, was called " to answer, at the instance of the Right honourable *F. Jeffrey*, our Advocate, for and in name and behalf of us, and of the Commissioners of our Woods, Forests, Land Revenues, Works and Buildings, in terms of an Act passed in the 3d & 4th years of our reign, c. 69, and Acts therein recited,—pursuers ; to whose great hurt and prejudice, as acting for us and the public in virtue of the said Acts, the warrant

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and grant, letters-patent or commission, after mentioned, were made, given or granted." The summons, after setting forth the Royal warrant and commission, stated, as grounds of reduction thereof, "*first*, that they were informal and incomplete: *secondly*, that King *George* the Fourth, our Royal predecessor, had no power to make or grant the same: *thirdly*, that the said warrant and commission, in so far as they granted to the defender, for his life, an annuity or yearly salary out of the rents, revenues, &c. of the lands and lordships of *Ettrick* Forest and *Dunbar*, forming parts of the hereditary land revenue of the Crown in *Scotland*, were *ultra vires* of his said Majesty, inasmuch as the said hereditary revenue, having been surrendered without reserve to the disposal of Parliament, on the accession of his said Majesty, was afterwards settled upon his said Majesty for his life only; whereby it was incompetent for him to alienate or burden the same in any way by grants to have effect beyond his demise: *fourthly*, that the settlement of the said hereditary revenue, so made on his said late Majesty for his life, having come to an end on his demise, the same was, upon our accession, again placed by us at the disposal of Parliament, and by them made part of the consolidated fund, and subsequently vested in our Commissioners of Woods, Forests, &c. in terms of the said Act of the 3d & 4th years of our reign above referred to; whereby we and the said Commissioners have now the sole and undoubted right to collect and dispose of the whole hereditary and land revenues of the Crown in *Scotland*, as they existed at the time of the accession of his said late Majesty King *George* the Fourth; and the said warrant and commission are granted in violation of our rights, and have the effect of diminishing the amount of our hereditary land-

revenues in *Scotland*." The summons concluded for reduction of the said warrant and commission, with all deputations founded thereon; and that it might be declared by decree of the Court that the same were void *ab initio*; and that Lord *Dunglas* and his deputy might be ordered to desist from collecting or intermitting with the said rents, revenues, &c., and might be further ordered to repay to the pursuer, with interest, all the monies received by him or his deputy by virtue of the said warrant and commission.

To this action Lord *Dunglas* took preliminary defences: *first*, that the pursuer, prosecuting on behalf of the Commissioners of Woods and Forests, had no title to claim repayment of the salary paid to the defender or his deputy during the life of King *George* the Fourth, out of whose hereditary revenue the salary was paid: *secondly*, that all parties were not called; for that, as the summons sought reduction of the deputation granted by the defender, and repayment of the salary paid to the deputy, he ought to have been made a party to the action.

The Lord Ordinary, by an interlocutor pronounced on the 25th of *June* 1834 (the first appealed from), reserved consideration of the first defence, viz. the want of title to pursue, till the merits of the cause should come to be disposed of, and allowed the second defence to be well founded; but as the pursuer was willing to bring the deputy before the Court by supplementary action, sisted process, in order that such action might be brought.

Such supplementary action was brought accordingly against Captain *Cunningham*: it differed from the first action only by the addition of the deputation granted to him by Lord *Dunglas*, and of words adapted thereto in the conclusions of the summons.

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Both actions having been conjoined, the two defenders gave in joint defences, as well preliminary as on the merits; the preliminary defence being in these terms: "The Commissioners of Woods and Forests are not empowered by the statute(*a*) to challenge an appointment granted by the Crown for the collection of its revenues. Any such challenge, if competent at all, can only be instituted at the instance of the Officers of State."

A record was afterwards made up, which was accompanied by this defence, as the first plea in law for the defenders. Revised cases having been subsequently prepared, the Lord Ordinary reported thereon to the Second Division of the Court; and the Lords of that Division, on advising the cases, ordered a hearing in presence upon the whole cause, and allowed the parties to lodge additional documents. Previous to that hearing, a special warrant, under his then Majesty's sign manual, to the Lord Advocate, was obtained and lodged in process, purporting to ratify the whole proceedings in the said actions, and to authorise the Lord Advocate to follow up the same.

After the hearing, the Lords of the Second Division, on the 24th of *December* 1836, pronounced this interlocutor (the second appealed from): "The Lords, &c. sustain the objection to the title of the pursuers to insist in their actions; dismiss the same accordingly, and decern; find the Commissioners of Woods and Forests liable to the defenders in the expenses of process; allow the accounts to be given in, and thereafter remit to the auditor to tax the same and to report (*b*)."

(*a*) 3 & 4 *Will.* 4, c. 69.

(*b*) Their Lordships' reasons for this judgment are fully given in the report of the case, in 15 *Dunl. B. & M.* 314.

Their Lordships, upon the coming in of the accounts of the taxed costs, finally disposed of the case on the 10th of *February* 1837, by this interlocutor (the third appealed from): "The Lords having advised this account, with the report of the auditor thereon, approve of the same, and decern for payment to the defenders of 284*l.* 14*s.* 8*d.* of expenses of process, together with the dues of extract; and allow this decree to go out and be extracted."

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ON the 8th of *February* 1837, a new action was instituted in the Court of Session against Lord *Dunglas* and Captain *Cunningham*, "at the instance of our well-beloved cousins, &c. *William* Duke of *Argyle*, Keeper of our Great Seal of *Scotland*; *Robert* Viscount *Melville*, Keeper of our Privy Seal of *Scotland*; the Right hon. *William Dundas*, our Clerk Register; *David Boyle*, our Justice Clerk; and *John Archibald Murray*, our Advocate, *our Officers of State* for *Scotland*, *for our interest*; and the said Right hon. *J. A. Murray*, our Advocate, for and in name and behalf of the Commissioners of our Woods, Forests, &c., in terms of an Act passed in the 3d & 4th years of our reign, c. 69, and Acts therein recited, for any right or interest they have in the premises,—pursuers; to whose great hurt and prejudice the warrant and grant, letters patent, or commission, and deputation and factory, aftermentioned, were made and granted; and having respectively right, title, and interest to prosecute and follow forth the action and conclusions underwritten." The summons in this action set forth the warrant and commission and deputation *verbatim*, as in the former conjoined actions, and contained the same grounds of reduction, with this qualification of the denial, in the said second

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ground of reduction, of *George* the Fourth's power to make the said grant; viz. "at least to the effect of the said warrant, commission, &c. enduring or having effect beyond the period of his said Majesty's demise;" and with the addition of a new (the third) ground of reduction, viz. that the said warrant, commission, &c., under the narrative and disguise of a grant of the office of Chamberlain or Collector of the rents, &c. of *Ettrick* Forest, was and is unwarrantable, illegal, and inept, as an alienation, and for a period exceeding the reign of his Majesty grantor thereof, of the whole revenues of the lands and lordship specified in said grant, and also of a large part of the rents, &c. of the lordship of *Dunbar*." This summons also contained the same subsidiary conclusions for interdict and repetition against the defenders, except that the repetition was limited to the monies received by them since the accession of King *William* the Fourth to the Crown.

Against this new action the defenders thereto stated a preliminary defence of the previous action for the same purpose. They were met with the statement that the judgment in the previous suit was final, and that that was no longer a pending action. There was not then any intimation of an appeal against the judgment in that suit. The Lord Ordinary, by an interlocutor of the 20th of *May* 1837, reserved to the defenders the benefit of the objection, and ordered defences on the merits. Such defences were lodged accordingly; and the defenders submitted that they ought to be assoilzied from the conclusions of the action, on the following, among other, grounds:—

1. It was not beyond the powers of his late Majesty *Geo.* 4 to appoint the defender (Lord *Dunglas*) Chamberlain of *Ettrick* Forest, during the whole period of

his life, for the purpose of collecting the revenues of the Forest, with a salary for the performance of that duty.

2. The reasons of reduction, in so far as rested on the supposition of the hereditary revenue of the Crown of *Scotland* having been surrendered to the disposal of Parliament by his said late Majesty, are ill-founded, inasmuch as no surrender was ever made, his late Majesty having enjoyed and possessed the income of his hereditary revenue in *Scotland* until his demise.

3. The defenders' appointments are effectually protected by the provisions of the statutes passed during the present reign (of *Will. 4*), in respect that they expressly declare, 1st, That the hereditary revenues shall only be surrendered under the burden of all such grants as those in favour of the defender: 2d, That they shall only be transferred to the consolidated fund under burden of the annual sums or pensions charged upon it: And 3d, That no appointment of Chamberlain or Collector shall be made void by the passing of the Act; but that every such Chamberlain or Collector shall continue in office until his death or resignation.

4. As the defender, Lord *Dunglas*', appointment has been recognised and sanctioned by the Crown since the demise of his late Majesty (*Geo. 4*), while in the full knowledge of the provisions contained in it, the pursuers are barred from reducing it, by acquiescence and homologation.

5. The conclusions of the summons for repetition are groundless. The defenders have discharged the duties, in consideration of which their salaries were granted.

6. At all events, as the defenders' salaries were paid in the full knowledge of the terms of their

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appointments, they are protected from all claim of repetition on the plea of their salaries having been *bond fidé percepti et consumpti*.

A record was afterwards made up and closed upon revised condescendences and answers, with notes of pleas in law for each party. The pleas for the defenders consisted of their said grounds of defence; and those for the pursuers, of the grounds of reduction and conclusions of the summons before stated; and they further insisted that the appointments of the defenders, and their salaries, expired by the demise of King *George 4*, and that from that time they were bound to repay to the pursuers all the monies received and retained by them in virtue of their appointments; and added, in answer to the defenders' said fourth plea, that there were no grounds on which a plea of acquiescence and homologation could be maintained in the circumstances of the case; and that the interests of the Crown could not be injured by any neglect of its officers.

These pleas on both sides, and the whole cause, were afterwards elaborately argued in the cases given in by the parties, pursuant to the Lord Ordinary's appointment. The cases having been reported by his Lordship, with the cause, to the Second Division of the Court, the Lords of that Division directed revised cases and other proceedings to be laid before the Lords of the First Division and the permanent Lords Ordinary.

On the 21st of *December* 1838, after the return of the cause, with the opinions of the consulted Judges, the Lords of the Second Division pronounced this interlocutor:—"The Lords having resumed consideration of this process, with the opinions of the consulted Judges, in respect of the opinions of a majority of the

whole Judges, reduce the grant and other writs under challenge, and decern, and declare accordingly; repelling in so far the defences against the conclusions of the libel—*Quoad ultra*, appoint parties to be further heard at the bar (c).”

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The Lord Advocate finding that it was the opinion of the Court that the conclusion of the action as to repetition was incompetent in that Court, asked leave, on behalf of the pursuers, to abandon that conclusion, reserving the right to insist on it before a competent Court. The Court allowed a minute to that effect to be given in; and, on again advising the cause with a view to dispose thereof and of the remaining conclusions of the libel, pronounced this interlocutor: “The Lords having resumed consideration of this process, with the minute for the pursuers, assoilzie the defenders from the conclusion of the summons for repetition and payment, and decern; reserving to the pursuers and all concerned to insist upon the same before a competent Court, as they shall be advised; and reserving to the defenders their answers and defences.”

The second appeal was against the two last mentioned interlocutors.

(c) The opinions of the nine consulted Judges, and of the four Judges of the Second Division,—all, except Lord *Meadowbank* and the Lord Justice-Clerk, agreeing that the grant of the office to Lord *Dunglas* for his life was *ultra vires* of King *George 4*,—are set out at length in the report of the case by Messrs. *Dunlop*, *Bell*, and *Murray*, vol. 1, N. S. p. 314. That report also states the old *Scotch Acts* annexing the lordships of *Ettrick Forest* and *Dunbar* to the Crown; and the statutes since the Union, regulating the Civil Lists of the successive Kings, particularly the Acts 1 *Will. 4*, c. 25; 2 & 3 *Will. 4*, c. 112, and 3 & 4 *Will. 4*, c. 69; by which last two Acts the management of the King's hereditary revenues in *Scotland* was transferred to the Commissioners of Woods and Forests.

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ON the 18th of *February* 1839, the Lord Advocate, in name and on behalf of Her Majesty, and of the Commissioners of Woods and Forests, presented a petition of appeal to this House against the three interlocutors pronounced in the first action.

The Respondents, having been served with the petition, required the usual recognizances to be entered into for the Appellants, according to the standing order, No. 61 (*d*).

The Lord Advocate then presented a petition to the House, stating the petition of appeal, and also the order, No. 61; and that he was advised that, the Crown in this case being virtually the Appellant, he ought not to be called upon to enter into recognizances to pay costs: because, 1st, by the common law of *England* the Crown never receives or pays costs; 2dly, that this is an appeal which relates to the prerogative revenues of Her Majesty; and 3dly, that, if the petitioner entered into recognizances, it might be open to the Respondents to contend that he thereby, by implication, admitted the right of the House of Lords to give costs against the Crown, and conceded the main point contended for by the appeal, viz. that the Court of Session has no power to give costs against the Crown: And further stating that he (the Lord Advocate) was also advised that the general order above referred to, could not be considered as binding on the Crown; for the Crown is not named in it, and must therefore be considered as excepted from it: And further, that if the petitioner were to enter into the recognizances, it would in fact be the Crown entering into recognizances with the Crown. The petitioner therefore prayed that he might be at liberty to pro-

(*d*) See the order in the Appendix to Vol. VI., *ante*, p. 749.

ceed with the appeal without entering into recognizances, or that their Lordships might be pleased to extend the time for entering into them, to give the petitioner further time to be advised on the subject, and to prevent the appeal from being dismissed.

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This petition was referred by the House to the Appeal Committee, who, by their report, recommended a fortnight's time to be given to the petitioner; which the House accordingly granted.

In the meantime the officers of the House, by direction of the Lord Chancellor, made search in the Journals of the House and in the rolls of recognizances, for precedents in regard to recognizances in causes in which the Lord Advocate was a party Appellant; and two Returns were prepared and laid before the House.

The first of these Returns contained the names of 15 appeals—from 1708 to 1838—wherein the Lord Advocate for *Scotland* was Appellant; and leave was given, on motion made for leave, to enter into recognizances:—

Name of Appeal.	When Presented.	Motion for Recognizance.
Officers of State for Scotland and the Lord Advocate v. Earl of Haddington.	5 G. 4 (e) -	Leave given for recognizance. Entered into by agent.
Same v. Same - -	1 & 2 W. 4 -	ditto.
Same v. Commissioners of Supply for the County of Wigton.	9 G. 4 - -	ditto.

(continued.)

(e) The pages of the Journals for the year were referred to; but they may be found by referring to the names of the appeals, in the Indexes to the Journals.

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	Lord Advocate for Scotland <i>v.</i> Mackenzie; <i>et c contra.</i>	49 G. 3 - -	Recognizance, entered into by agent for Lord Advocate.
	Same <i>v.</i> Hay <i>et al.</i> -	51 G. 3 - -	Ditto, entered into by agent for the Lord Advocate.
	Mackenzie, John, <i>et al.</i> , and the Lord Advocate, <i>v.</i> Scott <i>et al.</i>	3 G. 3 - -	Ditto, entered into by agent for Mackenzie and Morison only, but not for the Lord Advocate.
	Geddie and another, with concurrence of the Lord Advocate, <i>v.</i> Dempster.	-- 8 G. 3; Lord Advocate no party, unless prosecution at his instance.	Ditto, entered into by agent. No recognizance for Lord Advocate.
	Hepburn and the Lord Advocate <i>v.</i> Lord Portmore.	9 G. 3 - -	Leave given for recognizance. Entered into by agent for Hepburn only. No recognizance for Lord Advocate, although leave given generally for Appellants.
	Earl of Breadalbane and the Lord Advocate <i>v.</i> Menzies.	11 G. 2 - -	Ditto, on behalf of Earl Breadalbane, but no leave asked or given for Lord Advocate. No recognizance can be found, though the roll is extant and has been examined.
	Same <i>v.</i> Same - -	16 G. 2 - -	Ditto.
	Same <i>v.</i> Same - -	17 G. 2 - -	Ditto.
	Marquis of Tweeddale and the Lord Advocate <i>v.</i> Dundas.	30 G. 2 - -	Recognizance, entered into by agent on behalf of the Marquis of Tweeddale only.
	Same <i>v.</i> Anstruther -	30 G. 2 - -	Ditto.
	Sinclair and the Lord Advocate <i>v.</i> Earl of Breadalbane.	32 G. 2 - -	Ditto, entered into by agent on behalf of Sinclair only.
	The Lord Advocate, Munro, and others, <i>v.</i> Hart.	22 G. 3 - -	Ditto, entered into by agent on behalf of Munro and others, excluding the Lord Advocate.

The second Return contained the Names of 27 Appeals—from 1708 to 1838—wherein the Lord Advocate for *Scotland* was Appellant, in which

no recognizance was entered and no leave applied for:—

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Name of Appeal.	When Presented.	Motion for Recognizance.
Haldane, Patrick, and the Lord Advocate, v. Dean and Faculty of Advocates and principal Clerks of Session.	9 G. 1 - -	none.
Pitcairn, Alexander, and the Lord Advocate, v. Chrichton.	14 G. 2; leave given to make the Lord Advocate appellant.	ditto.
The Lord Advocate v. Boyd <i>et al.</i>	23 G. 2 - -	ditto.
Same v. Lord Pitsligo - - -	23 G. 2 - -	ditto.
Same v. The Duke of Gordon - -	23 G. 2 - -	ditto.
Same v. Gordon - - - -	24 G. 2; cross appeal presented; recognizance to cross appeal.	ditto.
Same v. Drummond - - - -	26 G. 2 - -	ditto.
Same <i>et al.</i> v. Dick <i>et al.</i> - -	26 G. 2 - -	ditto.
The Lord Advocate v. Urquhart, <i>et c con.</i>	27 G. 2; recognizance to cross appeal.	ditto.
Same <i>et al.</i> v. Thompson <i>et al.</i> -	28 G. 2 - -	ditto.
The Lord Advocate v. Sir L. Mackenzie.	28 G. 2 - -	ditto.
Same v. The Duchess of Gordon -	29 G. 2 - -	ditto.
Same v. Forbes - - - -	29 G. 2 - -	ditto.
Same v. Edwards - - - -	30 G. 2 - -	ditto.
The Lord Advocate v. Fraser -	30 G. 2 - -	ditto.
Same v. Hay - - - -	31 G. 2 - -	ditto.
Same <i>et al.</i> v. Duke of Montrose <i>et al.</i>	31 G. 2 - -	ditto.
The Lord Advocate v. Hay - -	31 G. 2 - -	ditto.
Same v. The Earl of Home - -	32 G. 2 - -	ditto.
Same v. Bayne; <i>et c contra</i> - -	32 G. 2 - -	ditto.
Same v. Douglas <i>et al.</i> - - -	4 G. 3 - -	ditto.
Same v. Mackintosh - - - -	4 G. 3 - -	ditto.
Lord Advocate v. Marquis of Lothian.	9 G. 3 - -	ditto.
Geddie and another, with concurrence of the Lord Advocate, v. Dempster.	9 G. 3 - -	ditto.
Same v. Same - - - -	10 G. 3 - -	ditto.
Same v. Same - - - -	11 G. 3 - -	ditto.
Same v. Same - - - -	12 G. 3 - -	ditto.

On the 22d of *March* 1839, a second petition was presented to the House by the Lord Advocate, stating,

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amongst other things, the searches that had been made for precedents, and praying their Lordships to take the premises into consideration, and that the petitioner might be at liberty to proceed with his appeal without entering into a recognizance; or that such petition, together with the petition formerly presented, might be referred back to the Appeal Committee, and that the time limited for the petitioner to enter into the recognizance might be further extended, so as to prevent the appeal from being dismissed.

This petition was also referred to the Appeal Committee.

The Respondents in this appeal then presented a petition to the House; and, after therein stating the said several actions, and the two appeals, and also the said petitions of the Lord Advocate, set forth the following, among other, objections to the prayer of the petitions: That in so far as the Lord Advocate was concerned, the question of recognizances was mixed up with the merits of the case; and if he should bring an incompetent appeal, they conceived that he ought to be subjected to the costs: That in regard to the Commissioners of Woods and Forests, there existed no reason why they should not enter into recognizances, which would be required from all others of Her Majesty's subjects: That it had been settled by a long train of decisions in the House of Lords, that their Lordships would not entertain an appeal merely or chiefly as to costs: That all the points at issue between the parties, which were attempted to be raised in the conjoined actions out of which this appeal by the Lord Advocate arose, were fully embraced in the other appeal which had been brought by the petitioners against the judgment in the second action raised against them by the Officers of State; and the

Lord Advocate having acquiesced in the judgment of the Court by bringing such second action, the only point remaining in the present appeal was the finding in regard to costs against the Commissioners of Woods and Forests. The petitioners therefore prayed that the two petitions of the Lord Advocate might be dismissed, and also the said appeal as incompetent, with costs.

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This petition also was referred to the Appeal Committee, on whose report thereon the House ordered that the two points, regarding the competency of the appeal and the recognizances, should be argued at the bar by one counsel of a side.

Those questions came to be argued in *May* 1841.

The *Lord Advocate* having been heard on behalf of the Appellants (*f*);

Mr. *Pemberton*, for the Respondents, said there was one point not clearly decided by the Court below, nor touched upon by the Lord Advocate at this bar; namely, whether the Crown was or was not a party to the action brought by the Commissioners of Woods and Forests. As to the recognizances, there was no reason why the Respondents should not have security for their costs from that body, at all events. But really all the questions in the cause would be better decided after the hearing of the appeals on the merits, without putting the parties to the expense of two hearings.—

The *Lord Chancellor*:—That point, whether the action was brought by the Lord Advocate on behalf of the Crown, ought to be inquired into.

(*f*) His arguments are omitted here, as they will be found in the report of the second argument, *infra*, p. 201 *et seq.*

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Mr. *Pemberton* :—The action was dismissed with costs, as being improperly instituted by a public body having no right to bring the action, The Lord Advocate submitted to the judgment of dismissal, by bringing the second action in the name of the Officers of State.

The *Lord Chancellor* :—The Court dismissed the first action, not on the merits, but as improperly brought. May not all the questions be disposed of at the hearing on the merits?

The *Lord Advocate* :—Our appeal case is not yet lodged, in consequence of the objection of the Respondents to our proceeding with it without entering into the recognizances.

Mr. *Pemberton* :—In the case of the *Norwich Charities*, on the appeal of *Bignold v. Springfield* (g), a similar objection was raised, and counsel were heard on it, but it was not decided until after the appeal was heard on the merits. As there is a second appeal between these parties, I would humbly suggest that, to save expense and the time of the House, both appeals ought to be heard at the same time.

The *Lord Chancellor*, after conferring with the other Lords present, said :—We cannot well dispose of these questions without hearing the arguments on the merits. It is better for the Respondents in this appeal to allow it to be lodged and proceeded in, without any recognizances. The second appeal may be advanced, so that both will come to be argued together.

His Lordship's suggestion having been acceded to,

(g) Vol. VII., *ante*, p. 71; see pp. 79–104.

it was ordered accordingly, "that the appeal of the *Lord Advocate v. Lord Dunglas* be received, without the Lord Advocate entering into the usual recognizances, the Respondent consenting; reserving the questions raised in these petitions, respecting the competency of the appeal and the obligation of the Lord Advocate to enter into recognizances, until the hearing of the said appeal on the merits: and that the said appeal, when ready for hearing, shall be heard together with that of *Lord Dunglas v. The Duke of Argyle and others, Officers of State.*"

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THE second appeal came to be heard first.

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 and 22.

Mr. *Pemberton* and Mr. *Hope*, for the Appellant:—The lordship of *Ettrick* Forest, among various other lordships and castles, was annexed to the Crown of *Scotland* by statute, in the year 1455, and from that period continued to be part of its hereditary revenue. It was one of the prerogatives of the Crown to appoint collectors of the revenues of these different estates, who in some of the grants were designated King's Chamberlains; in others Rangers of the Forest, or Keepers of the Castle. The appointments to these offices in former times were generally conferred for life, and sometimes even in fee. That is manifest from the 20th article of the treaty of Union. However, since the Union of the two kingdoms, the appointments of Chamberlains of *Ettrick* Forest appear, from a list produced by the Respondents, to have been made during pleasure, until the joint appointment of Mr. *Hope Vere* and Mr. *Mark Pringle* in 1786. To them the office was granted for their lives and the life of the survivor, with a reservation to any succeeding Monarch of the right to revoke the grant. But what-

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ever were the terms of the grants, even of those made during pleasure, there is no instance of any revocation, or other termination of them, than by the death of the grantee. Mr. *Alexander Pringle*, the last Chamberlain, received his commission in 1812 for his life, without any limitation ; and he held the office until his death in 1827, notwithstanding the demise of *George* the Third in 1820. On Mr. *Pringle's* death, the commission to Lord *Dunglas* was made out in the same terms, except that the salary was reduced to 300 *l.* instead of 500 *l.*, which all his predecessors in the office for a century had received : nor was there any attempt made to disturb Lord *Dunglas* on the demise of *George* the Fourth, nor for several years after, until the Commissioners of Woods and Forests, to whom the administration of these hereditary revenues of the Crown was transferred after the accession of *William* the Fourth, were urged to engage in this ungracious attempt.

These hereditary revenues of the Crown in *Scotland*, being inconsiderable in amount, were not noticed in the articles of Union : they were afterwards kept distinct from those of *England*, by special enactments ; were collected under their own regulations, and chargeable with their own burdens ; never forming any part of the *English* Civil List revenue, but being considered as the exclusive property of the Monarchs, each having the free disposal of them for life, subject only to such disposition of them as his predecessors might have made. Accordingly no notice was taken of them in arranging the Civil List revenue of King *George* the First ; and by the Act of Parliament regulating the Civil List of *George* the Second, it was expressly provided that the duties and revenues payable to his then late Majesty in *Scotland*, should be

continued and paid in the same manner, subject to the same or like charges, as during his said late Majesty's life. The right to the Crown gave the right to these revenues, as the *Scotch* Kings possessed them, being the patrimony of the Crown by its prerogative, without any Parliamentary grant of them. On the accession of King *George* the Third, a clause was introduced into the Act then passed for regulating his *English* and *Irish* revenues, by which it was provided, as it was by the Act passed on the accession of *George* the Second, that these duties and revenues in *Scotland* should be continued and paid during his Majesty's life, in the same manner and subject to the same charges as they were during the life of *George* the Second. And so also, while by the Act 28 *Geo.* 3, c. 33, and other Revenue Acts passed during that reign, all the branches of the *English* hereditary revenue of the Crown were placed by the King at the disposal of Parliament, there was a distinct reservation to his Majesty of his hereditary revenue in *Scotland* to be continued on its former footing; and so it remained with that Monarch as with his predecessors, subject and applicable to defraying the expenses of the *Scotch* civil establishment, and the other burdens with which he and they chose to charge it, either in the shape of grants of salaries annexed to offices, or in beneficial leases, or even in pensions, as appears by the Act 50 *Geo.* 3, c. 111, by which the grants of such pensions were restricted to 300 *l.* a year to each individual, or 25,000 *l.* in the whole. But by that very Act, it was provided that nothing therein should be construed to extend to prevent his Majesty from making any such grants (except pensions) for civil purposes in *Scotland*, out of the monies applicable

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to the payment of the Civil List there, as he was empowered and accustomed to make before that Act.

Again, on the accession of King *George* the Fourth, in the Act 1 *Geo.* 4, c. 1, settling the hereditary revenues of the Crown in *England* and *Ireland*, a special clause was introduced for reserving to his Majesty the hereditary revenue of *Scotland*, expressed in the same terms as the clause before stated contained in the Acts passed on the accessions of *George* the Second and *George* the Third. And by the Act 1 & 2 *Geo.* 4, c. 31, passed for "removing doubts as to the continuance of the hereditary revenue in *Scotland*," it was, among other things, enacted that the said hereditary revenue so settled on King *George* the Third for life, by the said Act 1 *Geo.* 3, "do belong to and are at the disposal of his present Majesty, in the same manner as they did belong to and were at the disposal of his late Majesty," (*George* 3), "and that the same, and the civil establishment in *Scotland* payable out of the same, shall continue to be paid in like manner as they were before, &c. provided that the surplus or balance which may remain after defraying the whole of the charges upon or incident to this said fund, &c. be carried to the account of the consolidated fund of the United Kingdom."

It is quite clear from these recited Acts, that the Legislature always intended a complete separation between the *English* and *Scotch* hereditary revenues, so far as regarded their collection and their application; the *English* revenues having been surrendered to Parliament, and made part of the consolidated fund, while the *Scotch* revenue was kept on a distinct footing, and appropriated to its own objects.

Then, as the statutes do not affect the grant of the

commission to Lord *Dunglas*, what is there at common law to prevent it from being valid and effectual? It was the gift of an office for the life of the grantee, with a salary attached, payable out of the heritable estate belonging to the Crown. Though the King may not grant an annuity chargeable on him personally, he may, if it be charged on his Majesty's possessions (*h*); and such grants bind the King's successors, though they be not mentioned in the grants (*i*). This grant was not, as some of the Judges in *Scotland* seemed to suppose, an alienation of the estates of the Crown; it was merely a grant of an office, and neither was, nor purported to be, in form or effect, a conveyance or alienation of any property. The estates and casualties of superiority remained the property of the Crown, as they had been before the grant. The salary might be disproportioned to the duties of the office, as the words of the grant certainly indicated, being "as well in consideration of the office as out of Royal bounty and favour;" but such disproportion—not at all uncommon in *England* or *Scotland*—does not affect the validity of the grant, while the salary was payable out of revenues vested in the Crown applicable to such burdens. Equally unfounded is the other supposition of the Judges in the Court below, that this grant was only a cover for a pension. That suggestion originated with the Judges; it was not alleged in the summons as a ground of reduction, and consequently cannot be acted upon in this suit, nor could a Court of Justice take cognizance of it, being matter only for the consideration of the Crown or of the Legislature; it was suggested, like the former allegation of alienation of the

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(*h*) *Chitty* on the Prero., p. 389.

(*i*) *Id.* p. 400.

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Crown property, by the disproportion between the salary and responsibility of the office; and also probably by the terms of the grant. But on both points it should be remembered that the salary to Lord *Dunglas* was less by 200*l.* than the salary received by his predecessors in the office for nearly a century.

The only ground on which any argument for revoking this grant can be maintained, is the surrender and settlement of the revenues of the Crown on the accession of the late King, *William* the Fourth. Until then there was not any surrender of this revenue in *Scotland*, nor was it ever dealt with as the property of the State, nor is there any authority for holding that it was previously so treated or dealt with; as is apparent from the Act 1 *W.* 4, c. 25, which enacts that the produce of all the free hereditaments, rents, and revenues in *England*, *Ireland*, and *Scotland*, be made part of the consolidated fund. But that Act contains provisions effectually protecting vested interests, by an express saving (in the 12th section) to all persons, of all grants whatever out of the revenues belonging to *George* the Fourth in *Scotland*, as fully to all intents and purposes as if that Act had never passed. That saving clause was not revoked by the subsequent Acts, 2 & 3 *W.* 4, c. 112, and 3 & 4 *W.* 4, c. 69, relied on by the Respondents; which only transferred the management of these revenues in *Scotland* from the Barons of the Exchequer there, to the Lords Commissioners of the Woods and Forests in *England*; with an express proviso by the 18th section of the latter Act, that "this Act shall not vacate the appointment of any Chamberlain or Collector of the revenues," &c. of his Majesty's lands; and "that every such Chamberlain or Collector, who shall be in office at the time of the

passing of this Act, shall continue in office until his death," or resignation, or removal.

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The *Lord Advocate* and Mr. J. Anderson, for the Respondents:—The action in which this appeal arose was brought at common law, as well as on the statutes mentioned in the summons. The question now is whether the King had power to make the grant. The nominal duties of the office is the collection of feu-duties within the lordship of *Ettrick* Forest, the annual amount of which never exceeds 235*l.*, while the yearly salary granted with the office is 300*l.*, with an allowance of 20*l.* more to a deputy; all charged not only on the monies collected, but, as they are evidently insufficient, on the revenues payable to the Crown out of the lordship of *Dunbar*. Under this grant Lord *Dunglas* collects the revenues, not for the Crown, but for himself. The grant, therefore, resolves itself into a direct alienation of that part of the hereditary land revenues of the Crown in *Scotland*, during the life of Lord *Dunglas*. There has been no instance of such a grant produced. From the Union of the two kingdoms, down to the accession of *George* the Fourth, the appointment of Chamberlain or Collector of the revenues of *Ettrick* Forest was granted only during pleasure, with two exceptions: first, in 1786, when a commission was issued to two Chamberlains jointly, and to the survivor for life, *if the grantor should so long live, and until the same should be recalled by any Royal successor*; and secondly, in 1812, when *George* the Fourth, then Prince Regent, issued a commission to Mr. A. *Pringle* for his life. He died in the lifetime of King *George* the Fourth, and so the event in which the legality of the grant might be questioned did not

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occur in that case. That event has occurred in this case, the grantee having survived the grantor; and it must appear quite plain to any one paying the least attention to the question, that *George* the Fourth had no power to grant a commission that was to have effect beyond his own life, so as to encroach on the rights and prerogatives of his Royal successors. There can, therefore, be no doubt that Lord *Dunglas*'s right to the office and salary expired on the demise of the grantor. This is the view which all the institutional lawyers of *Scotland*, and the Courts there, have taken of the common law, and of the old Acts of Parliament in *Scotland*, annexing these land revenues to the Crown: Lord *Stair*, b. 2, tit. 3, sect. 35; *Bankt.* vol. i. p. 538; *Ersk.* b. 2, tit. 3, sect. 19; *Bell's Prin.* p. 178, (3d edit.); The Earl of *Sutherland's* case, in 1721; *Sir Lawrence Dundas v. The Officers of State*, in 1779 (*k*).

But whatever was the power of former Monarchs over these revenues, at all events King *George* the Fourth had no power to make such a grant as this to Lord *Dunglas*, inasmuch as the hereditary revenue having been, at his accession, surrendered without reserve to Parliament, was afterwards settled on him by statute for *his life only*; and therefore it was incompetent to him to alienate or burden it by any grants to have effect beyond his life. Besides, the grant in question was not *bonâ fide* a grant of an office, but a disguised gift of a pension, involving an illegal alienation of part of the revenues of the Crown; and on that ground also the grant was invalid.

Assuming that, for the preceding reasons, the warrant and commission following thereon in favour of

Lord *Dunglas*, are to be set aside as void, it follows by necessary consequence that the deputation granted by his Lordship to the other Appellant, Captain *Cunningham*, must also be reduced, as flowing *a non habente potestatem*. The commission and deputation being reduced and set aside, the Respondents are entitled to a decree against the Appellants, discharging them from continuing to act as Chamberlain and Collector of *Ettrick* Forest, and from collecting or intermitting with, or receiving, or retaining for their own benefit any portion of the Crown revenues payable from the lands and lordship of *Ettrick* Forest, or from the lands and lordship of *Dunbar*.

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Mr. *Pemberton* was going to reply—

The *Attorney-general* said—addressing the House—he should claim, as of right, on behalf of the Crown, to reply generally, after Mr. *Pemberton*'s reply.

Mr. *Pemberton* objected. The hearing of counsel is regulated by a standing order of the House (*m*). The right now claimed has never been exercised, nor ever before been claimed in this House, as far as a diligent search in the Journals shows. It was claimed by the *Attorney-general*, for the Commissioners of Woods and Forests, in the case of *Monck v. Huskisson* (*n*), in Chancery, but not granted. The *Attorney-general*, as informant in ordinary cases, has the reply, of course. In the *Troutbeck* case, before Lord Chancellor *Brougham*, no such claim was made.

Lord *Brougham*:—That case was twice before me; once on appeal from the Vice-Chancellor, and after-

(*m*) No. 119. *Vide* App. to Vol. VI., *ante*, p. 976.

(*n*) 1 Sim. 280, and 4 Russ. 121, n.; not reported on this point.

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wards on a motion for a new trial (*o*). The Attorney-general did not, on the appeal, claim a reply after the reply for the Appellant: on the motion he was not heard at all.

Where the Crown prosecutes, the Attorney-general has a reply, although no witnesses are called on either side.

Lord *Cottenham*:—In the case of *Rex v. Peto* (*p*), in the Court of Exchequer, there was no general reply claimed by the Attorney-general.

Mr. *Pemberton*:—In *Wall v. The Attorney-general* (*q*), which was brought to this House on appeal from the Court of Exchequer, and on the preliminary objection that the appeal did not lie, the Attorney-general did not claim a reply.

Lord *Campbell*:—I do not remember any case in which the Attorney-general replied on the reply of the counsel for the plaintiffs or pursuers.

Mr. *Pemberton*:—The most diligent search has been made in the Journals of the House for a precedent, without success.

The *Attorney-general* admitted that they did not find any precedent; at the same time he submitted that he had a right to a general reply.

Lord *Cottenham*:—The question having been raised by the Attorney-general, must be decided.

The Lords, after having conferred together on the point, informed the Attorney-general “ that it was not

(*o*) *Monkton v. Attorney-general*, 2 Russ. & M. 147. 167.

(*p*) 1 Y. & J. 37. 169.

(*q*) Vol. VII. *ante*, p. 81, n.

the usage of this House for the Attorney-general to have a general reply on the part of the Crown."

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After Mr. *Pemberton* had concluded his reply for the Appellants, the case was adjourned for consideration.

THE first appeal, and the preliminary questions as to its competency and the obligation of the Appellant to enter into recognizances, came now to be further argued. (*Vide supra*, pp. 189, 190.)

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The *Attorney-general*, with whom was Mr. *J. Anderson*, for the Appellants:—The merits of the principal question in the action out of which this appeal arose, have been already fully discussed in the appeal brought by the present Respondents. The only questions which remain to be argued are, 1st, the title of the Lord Advocate and the Commissioners of Woods and Forests, to sue in the form which was adopted; 2dly, the liability of the Crown and its officers to pay costs. The other questions, as to the competency of the appeal, and the recognizances, reserved by the House (*supra*, p. 191), are dependent on the question of liability for costs. These three questions, therefore, may be considered together; the question of title to sue being matter for separate argument.—

The *Lord Chancellor*:—If the Lord Advocate be not liable to pay costs of suit whether he succeed or fail, it will not be necessary to enter at all into the question of title to sue.

The *Attorney-general*:—Except in the view that the question of liability to costs should be decided against the Lord Advocate.

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It is the admitted prerogative of the Crown, suing by its law officers, not to pay costs in any case. There is no distinction in that respect between suits at the direct instance of the Crown, and suits by the officers of particular departments of the Government. This prerogative is not for the private benefit of the Monarch, but appertains to him in his public capacity, and for the public benefit. In every suit in which the Crown is concerned in *England*, it is represented by the Attorney-general, but in no case is the Attorney-general liable to pay costs of the suit. Even in Exchequer cases, where the informations are often by private parties or public officers in the name of the Attorney-general, neither he nor the particular department of the Government which he for the time represents has ever been held liable to pay costs. This prerogative of the Crown is co-extensive in all parts of the kingdom; and the exemption is recognised in *Scotland* as well as in *England*, in all cases where the Lord Advocate sues on behalf of the Crown or any department of the executive Government. The rule is universal that the Crown or any person suing on behalf of the Crown, in civil as well as criminal suits, does not pay costs; 3 *Black. Comm.* p. 400 (15 edit.), Per Lord *Mansfield* in *Wilkinson qui tam v. Allot* (r), *The King v. Miles* (s), *The King's Advocate v. The Magistrates of Kirkwall* (t), *The Attorney-general v. The Earl of Ashburnham* (u).

King *William* the Fourth, on his accession to the throne, surrendered the hereditary revenues of the Crown in *Scotland* to the disposal of Parliament; and by the Act 1 *Will.* 4, c. 25, they were declared to form part of the consolidated fund. By another Act,

(r) Cowp. 367.
 (s) 7 T. Rep. 367.

(t) 10 Sh. & D. 321.
 (u) 1 Sim. & Stu. 397.

2 & 3 *Will.* 4, c. 112, the powers of the Commissioners of Woods and Forests were extended to the collection and management of the land revenues of the Crown in *Scotland*. The interest of that body is just like that of the Lords of the Treasury, or any of the other public Boards for public purposes; and this action is at their instance, in exercise of their public duty as officers of the Crown, representing the public. The Lord Advocate is on the record merely as the law officer through whom the Crown, either directly or by its public officers, institutes legal proceedings in *Scotland*.—

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Lord *Cottenham*:—The interlocutors now under appeal do not appear to affect the Lord Advocate, but the Commissioners of Woods and Forests.

The *Lord Chancellor*:—The first reason of appeal is, “Because the Appellant, as Lord Advocate of *Scotland*, has an undoubted title to prosecute the present action in name and on behalf of the Crown,” &c.

The *Attorney-general*:—If the Commissioners represent the Crown, how could the ordinary forms of law to enforce payment of the costs be adopted or made available practically? Or of what effects could sale be made of the Crown property, for payment of costs? The private effects of the Commissioners or the Lord Advocate could not be held liable. If the Commissioners or the Lord Advocate,—whichever be the proper party to deal with on the record,—represent the Crown, and if the Crown as so represented be not liable for costs, that consideration disposes of the question as to the necessity for either to enter into recognizances; for if the Crown is not liable to pay costs, what is the use of the representative of the Crown entering into recognizances? The

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practice is conformable to the principle ; for with the exception of a short period after 1809, while Mr. *Mundell* held the office of agent for the Crown, there is no instance of recognizances being entered into for the Lord Advocate, or for the Crown represented by its public officers. It appears by the Returns (x) made by the officers of the House, that Mr. *Mundell* on some occasions entered into recognizances, and on others omitted doing so ; but on no occasion does the question of obligation to enter into them appear to have been at all made the subject of discussion. And here again practical considerations support the argument on principle ; for the recognizances are taken to the Crown by the officer of the House ; and if the costs are not paid, the payment can only be enforced by estreating the recognizances and issuing a writ of extent, not against the effects of the Commissioners or of the Lord Advocate, but of the Crown. The absurdity of compelling the Crown to enter into recognizances to itself is too glaring.

It follows, as matter of course, from these considerations, that any judgment of any Court, awarding costs against the Crown or its officers, is a proper subject of appeal on the point of costs only, whether the judgment was right or wrong on the merits. The law as to the competency of appeals upon costs is well understood. Where costs are matter in the discretion of the inferior Court, no appeal lies against the judgment of that Court for costs merely. But where the Court has no discretion as to costs, as where they are given by statute, and the Court refuses them, or where the Court gives them out of a fund not properly chargeable, or against a party not liable, as

(x) *Vide ante*, pp. 185-6-7.

in this case; in short, wherever the Court has no power to give or refuse costs to a party, and yet gives a judgment awarding costs, as if it had such power, in all such cases an appeal lies; *Owen v. Griffith* (y), *Taylor v. Popham* (z), *Tod v. Tod* (a), *Burkett v. Spray* (b), *Angel v. Davis* (c).

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Mr. *Anderson* was proceeding on the same side, but was stopped by the Lords.—

Mr. *Hope* (in the absence of Mr. *Pemberton*), for the Respondents:—The Commissioners of Woods and Forests were the pursuers in this action, and not the Crown.—

Lord *Brougham*:—There is no order upon the Crown; the interlocutor is against the Commissioners of Woods and Forests. But what Commissioners? There is a new set. The body does not now exist against whom the interlocutor is directed.

The *Lord Chancellor*:—Suppose the interlocutor to be right, how could you proceed to recover the costs in *Scotland* against the Commissioners?

Mr. *Hope*:—If they acted beyond their power, and tortiously, they must be personally liable. The law is different in *Scotland* from what it is in *England*.

Lord *Brougham*:—But how could you enforce that liability in *England*, the Commissioners not being the same?

Mr. *Hope*:—Against the Commissioners personally

(y) 1 Ves. sen. 249.

(z) 15 Ves. 72. 78.

(a) 2 Wils. & S. 542.

(b) 1 Russ. & M. 113; see p. 115, and cases there mentioned.

(c) 4 Myl. & C. 360.

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who did the act, and the representatives of such of them as may be dead.

This action was brought by the Lord Advocate originally, without any warrant from the Crown; and was therefore in its inception incompetent, so far as it was at the instance of the Crown. Being so incompetent, it was not sustained by the warrant subsequently produced; but the Court below determined that the action was not at the instance of the Crown, but at the instance of the Commissioners of Woods and Forests alone, and that the Commissioners had no title to sue for a reduction of the Respondent's commission. The Commissioners, therefore, in raising this action, were not exercising the powers vested in them by the statute 10 *Geo.* 4, c. 50, extended by the statute 3 & 4 *Will.* 4, c. 69, but were proceeding in excess of these powers, and in so doing were wrongdoers and guilty of a tortious act, for which they must be personally responsible. The rights of the Crown are not communicated to them, *Watt v. Morris* (*d*). And if the Lord Advocate had no right by virtue of his office to bring the action, then he can have no right to maintain the appeal; and if he brings an appeal which he cannot maintain, there is no reason in law or in equity why he should not be subjected to costs of the appeal, as well as of the action so incompetently brought.

But passing over this view of the case, it is to be observed that exemption from costs is not part of the prerogatives of the Crown. In *England*, liability for costs was not known to the common law; it was introduced by the Statute of *Gloucester* (*e*); and the exemption of the Crown, so far as it may have existed,

(*d*) 2 Bing. N. C. 189; see p. 199.

(*e*) 6 *Edw.* 1, c. 1.

arose from an omission, the Crown not having been mentioned in the statute. Mr. Justice *Blackstone* says, in the passage (3d vol. p. 400) before referred to, that it is beneath the dignity of the Crown to receive costs. But there are many cases, under statutes, in which the Crown receives costs; which is certainly not more beneath its dignity than to pay them. So great is the hardship of the exemption of the Crown from costs in charity informations, deemed to be, that relators are joined as parties with the officer of the Crown, for the sole purpose of being answerable for costs to the opposite party. But in *England* and *Ireland* there is a diversity of practice as to this prerogative; *The King v. Hassell* (f), *The Attorney-general v. Joyce* (g); and in *Scotland*, the liability of public officers suing on behalf of the Crown to pay costs was declared in the case of the *Lord Advocate*, on behalf of the *Lords of the Treasury*, v. *Campbell's Trustees* (h), which is, in other respects also, very similar to the present case.

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[*The Attorney-general*:—The costs in that case, in fact, were never paid.

Lord *Cottenham*:—Because, I suppose, there was nobody against whom any proceedings to recover them could be enforced.]

The Court certainly awarded the costs against the Lords of the Treasury. The same rule was recognised by Lord *Meadowbank*, in the case of *The King's Advocate v. The Magistrates of Kirkwall* (i), before referred to. Were the rule as contended for on the other side, public functionaries might take up any man's estate, or do any tortious act, or bring actions

(f) 1 M'Cle. 110.

(h) 14 Sh. D. B. & M. 657.

(g) Hayes' Exc. Rep. (Irel.) 205.

(i) 10 Sh. D. & B. 328.

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ever so absurd, under shelter of the prerogative of exemption from costs. The rule in *Scotland* is, that where the Crown sues directly by the Lord Advocate, it is not liable for costs; but where the Lord Advocate sues for a public Board, then costs may be given. The 17th section of the statute 10 *Geo.* 4, c. 50, shows that it was not considered that immunity from costs would attach to the powers conferred upon the Commissioners of Woods and Forests; for special provision is thereby made as to the fund, out of which the costs of suits at law or in equity, against the Commissioners, are to be provided.

The *Lord Chancellor*:—As the revenue was vested in the Commissioners, it was necessary that they should be enabled to sue; they are substituted for the Crown: And the 17th section is to protect persons dealing with the Commissioners from personal liability.

What do you say, Mr. *Attorney*, as to that case of *Campbell's Trustees*?

The *Attorney-general*:—The judgment of the Court in that case was against the Lords of the Treasury, contrary to the opinion of the Lord Ordinary. The expenses have not been paid.

The *Lord Chancellor*, Lord *Brougham*, Lord *Cottenham*, and Lord *Campbell*, having referred to the report of that case, said they found it difficult to understand it.

Mr. *Pemberton* (having now arrived) referred to the case of *Monck v. Huskisson* (*k*), a suit for specific performance, against the Commissioners of Woods and Forests. The Commissioners excepted to the Master's report on the title, and the exception was

(*k*) 1 *Sim.* 280, and 4 *Russ.* 121, n.

overruled; and the course of the Court in overruling exceptions is to give costs against the party excepting. If the rule had been departed from, the Reporters would have mentioned the matter.

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The Attorney-general:—In that case the Commissioners had signed the contract in their own individual names, and the suit was against them in the same character.

Mr. Pemberton:—That could not make any difference. They were defending the suit for the Crown.

The Lord Chancellor:—It does not appear to me that there is any invariable practice upon this subject. I should hesitate before I could come to the conclusion that there is a settled practice, as it is said, in the Courts of *Scotland*, in cases of this kind. It does not appear to me that that judgment, in that single case of *Campbell's Trustees*, is sufficient to justify this House in coming to the same conclusion in the present case.

Mr. Hope:—Such a practice is urged in the other case to which I have referred, the case of *The Magistrates of Kirkwall*, in the 10th vol. of *Shaw & Dunlop*; and is admitted by the counsel on the other side.

The Lord Chancellor:—I see nothing in the case to satisfy me that there is anything of the kind admitted by the Court in that case.

Mr. Hope:—It is said that the officers of ordnance, and excise, and customs, are liable.

The Lord Chancellor:—That is said at the bar; but the Court say, how can you make them liable?

Lord Brougham:—I do not see that there is any

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assent by anybody to what the counsel says. The Lord *Justice-Clerk* says, "I should like to know how you could make good such a claim of expenses. I think you are bound to point out the fund, and how you are to operate upon it."

The *Lord Chancellor* :—I certainly do not see that there is any settled rule applicable to this case, in the way conceived by the Court below.

Mr *Pemberton* :—Then I should submit that the question of costs would be matter of discretion with the Judge; and if so, they could not be the subject of appeal to your Lordships' House, according to the principle laid down in *Owen v. Griffiths*, *Tod v. Tod*, and the other cases already cited. If your Lordships find that there is no settled rule, the costs must of course depend upon the discretion of the Judge.

Lord *Brougham* :—What was intended by the Lord Chancellor was, that there was no settled practice to take the *Scotch* cases out of the general rule.

Mr. *Pemberton* :—I understand the Lord Chancellor's observation to be, that there is no general rule of practice on the subject.

Lord *Campbell* :—It is quite impossible that the practice maintained in that case in *Scotland* (*Campbell's Trustees*) could be of any standing.

The *Lord Chancellor* :—The only case cited to us is that, which occurred in the same year with the present proceeding.

Lord *Brougham* :—And that case is not intelligible to us from the report. We cannot consider it as an authority.

The *Lord Chancellor* :—I feel certainly what the

Lord *Justice-Clerk* says, that you are bound to show you can enforce the claim against some party. How can you proceed to recover these costs in the Court below, in case we grant them?

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Mr. *Pemberton* :—We can recover them by action on the judgment, in the usual way. We do not apprehend that the Crown or its officers will abscond to avoid service of process.

We do not think it necessary to trouble the House on the question of recognizances; because, if the Appellants are not liable to costs, of course they are not bound to enter into recognizances.

Lord *Brougham* :—I certainly agree with my noble and learned friend that the case of *Campbell's Trustees*, in the 14th vol. of *Shaw & Dunlop*, cannot at all lead us to the conclusion that there is a different rule prevailing in *Scotland*, from that which is held to govern the question as often as it is raised here; and the other case of *The Magistrates of Kirkwall*, in the 10th vol. of *Shaw & Dunlop*, appears to me, so far as it proves anything, to go the other way.

I must beg to enter my protest against the distinction which has been taken in arguing this case, both here and below, as to the prerogatives of the Crown being different, where the Crown is supposed to be dealing with what is called its private and individual property, and the public property. The prerogative of the Crown is precisely the same as regards what is called the property of the Sovereign, and the property of the public. It is only within the last half-century that any private property has been acknowledged to exist in the Crown at all; prior to that, all lands descending on the Crown, even from ancestors or collateral relatives, were held *jure coronæ*. All the property of

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the Crown is held for public purposes, and is Crown property, except that which the individual Sovereign has retained a right to deal with in his private and personal capacity; it is public property, which the Crown administers for the maintenance of the State. With respect to the Crown lands, they are as much public property as any other property connected with the consolidated fund, or connected with any other branch of the revenue; those lands are vested in the Crown for public purposes, to maintain the dignity of the Crown; and the prerogative applies as much to them as it does to any other branch of the revenue appropriated to other services.

Lord *Cottenham*:—I am entirely of the same opinion. I apprehend there is no difference—and it would be strange indeed if there could be a difference—between the prerogative of the Crown in *Scotland* upon this point, and the prerogative of the Crown in any other part of the kingdom. The Attorney-general in this country, and the Lord Advocate in *Scotland*, equally represent the Crown; they are only acting for the Crown, and are not liable for costs. Then is this, or is it not, a proceeding by the Lord Advocate on behalf of the public? Beyond all doubt it is. Whether the particular property is under the management of the Lords of the Treasury, or under the management of the Commissioners of Woods and Forests, is quite immaterial; the suit is for the benefit of the public; and whether the public revenue is subject to an arrangement which leaves it in particular officers, or in the hands of the Crown, the prerogative of the Crown is not altered by that arrangement. The public officer suing for certain property in *Scotland*, the great question is, whether he is liable for costs, because the

Court is of opinion there was an informality in the mode in which the Crown instituted its suit. It would require a very strong practice to maintain such a point; but when we come to look into the supposed authorities which have been referred to, it is clear they are no authorities at all. From the case of *The Magistrates of Kirkwall*, it is clear the rule did not exist prior to 1832; no case is referred to antecedent to that. If the principle cannot be recognised, that case cannot be authority for this House to sanction this interlocutor of *December 1836*, founded on a decision in the month of *March* in the same year. I consider the interlocutor of the Court of Session erroneous; I think, therefore, your Lordships would do right in reversing it.

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Lord *Campbell* concurred.

It was accordingly ordered, "That the prayer of the Respondents' petition, to dismiss the appeal as incompetent, be refused: And it was further ordered and declared, that according to the usage of this House, the Lord Advocate for *Scotland*, when suing as such on behalf of the Crown, or in matters in which the Crown is interested, upon presenting an appeal to this House, is not required to enter into recognizances to answer the costs of the said appeal: And it was further ordered and adjudged, that the said interlocutors complained of in the said appeal, so far as the same relate to the costs ordered to be paid by the Appellants, the Commissioners of Her Majesty's Woods, Forests, &c., be reversed: And this House does not, under the circumstances, think it necessary to give any opinion as to the objection to the title of the pursuer to insist in the action, nor as to the other matters contained in the said interlocutors complained of in the said appeal."

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THE other appeal, *Lord Dunglas v. The Officers of State for Scotland*, having been appointed to be further considered this day ;—

Lord *Brougham* moved the judgment of the House :
 — In *January* 1827 a warrant under the sign-manual, and in *September* of the same year a grant under the great seal of *Scotland*, was issued to the Appellant, purporting to confer upon him for life, the office of Chamberlain and Collector of the rents, revenues, feu-duties, and other casualties of superiority issuing and payable to the Crown out of the lands and lordship of *Ettrick Forest*, with power to appoint a deputy or deputies. There was added the further grant of an annuity or yearly salary of 300*l.* to Lord *Dunglas* himself, and 20*l.* to his deputy or deputies ; and this annuity or salary of 320*l.* a year is stated to be as well in consideration of the said office as out of his Majesty's Royal bounty and favour to the said grantee. The rents and feu-duties are admitted upon the pleadings to consist of money payments, which amount to the fixed sum of 235*l.* 7*s.* 7½*d.* and never have exceeded that sum. The warrant and grant provide, that if the annuity or salary of 320*l.* cannot be obtained from the rents of *Ettrick Forest*, the difference shall be made good out of the Crown revenues in the lordship of *Dunbar*.

An action of reduction of this grant was brought first by the Lord Advocate on behalf of the Crown, and of the Commissioners of Woods and Forests ; and upon the objection being taken to the competency of the parties, the action was afterwards brought by the Officers of State, with the concurrence of the Lord Advocate, on behalf of the Commissioners. The Court of Session sustained the objection to the com-

petency of the action as first brought; and the judgment formed the subject of an appeal: They also, by a majority of the consulted Judges, sustained, in the second action, the reasons of reduction, and set aside the grant, discharging the defendants from the conclusion of the summons to make repayment of the sums received by them, as incompetent in that action.

It does not seem necessary to go into many of the reasons upon which this decision proceeded; one is sufficient to set aside this grant. There can be no ground whatever for treating it as the grant of an office; it was to all intents and purposes the grant of a pension. This appears clearly enough even from the language of the grant; but the annexation of a salary of 320*l.* for collecting a revenue of 235*l.*, at once shows that it was a pension out of the land revenues, which was granted under the colour or disguise of granting an office. Nor does this disparity appear to have been matter of any doubt when the grant was made; for provision is expressly made that whenever the monies of the said collection come short, that is, the monies for collecting which the salaries were granted, payment shall be made out of the Crown rents of *Dunbar*. This grant, therefore, was merely colourable as the grant of an office; it was a shift for the grant of a pension, which could not be granted to endure beyond the life of the Sovereign granting it; and being charged on the land revenue, it was in fact an alienation of a portion of the revenue. If the Sovereign could grant 300*l.* a year out of that revenue, he might have granted the whole; and if he could grant any portion of it during the life of the grantee, there is no conceivable reason why he might not in the like manner have granted the whole away from the Crown in perpetuity.

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It thus becomes unnecessary to consider what power the Crown has of granting the office of Chamberlain for the life of the grantee ; because this was in truth no grant of the office. But it may be observed that a very strong opinion was given by the learned Judges of the Exchequer in *Scotland* in 1721, in a case in which a grant for life had been made of the Chamberlainship of *Ross*, and 500 *l. per annum*, to Lord *Sutherland*. Their Lordships remonstrated with the Treasury on the ground, expressly stated by them, that no such grant could be made either for life or years. Although this may be said to be in some sort an extrajudicial opinion, it is yet entitled to great respect considering the quarter from which it comes. It is well known—to say nothing of such opinions taken in ancient times—that there was one of great celebrity taken early in the last century. An important principle respecting the constitutional power of the King in this country rests upon the opinion taken in the time of *George* the First ; the Judges (*dissentientibus* Baron *Price* and Justice *Eyre*) reporting their opinion that the care and disposal of the children of the Royal family belong to the reigning Sovereign (*l*). The law on this point has ever been regarded as settled by that opinion.

An objection has been taken by these Appellants on the ground that the summons gave no reason of reduction, to raise the question, whether the grant was a *bonâ fide* gift of the office, or only a pension under colour of such gift. But supposing that it was necessary to specify all the reasons in the summons, and that the general words at the conclusion could not cover the particular reason, and supposing that the second reason of the summons, denying the

(*l*) The grand opinion, *Fortescue Alund's Rep.* p. 401.

power of the King to make such a grant, was not sufficient, still there seems to be particular words quite sufficient for the purpose. The third reason of reduction in the summons at the instance of the Officers of State, expressly states the grant to be "illegal and inept, as an alienation, and for a period beyond the King's life, under the narrative and disguise of the office of Chamberlain." (*Supra*, p. 180.) This seems to be the very reason in question.

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It has become unnecessary to examine how far the surrender and enactments at the commencement of their reigns, have in recent times tied up the hands of the successive Sovereigns. There appears, however, no reason for coming to a different conclusion on this subject from that which several of the Judges below have arrived at, particularly Lord *Jeffrey*, after a very able and careful examination of the Civil List Acts. The grant of the pension in this case appears to be wholly inconsistent with these provisions. The judgment, therefore, which is appealed from, on the reduction, must be affirmed.

Lord *Campbell*:—I would merely take notice of one point which arose, to which my noble and learned friend has referred; namely, the construction of the Civil List Acts. It seems to me that the learned Judges below have thrown out some expressions upon that subject which are hardly to be defended, because they supposed that the King, by his speech, surrendered all his land revenues for ever to the use of the public; and that there was only a re-grant by Act of Parliament for his own life. It seems to me that that is an erroneous view of the subject, because the King's speech would operate nothing; it was only an intention indicated graciously by the Sovereign, that he

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was willing to enter into such an arrangement if Parliament should approve of it; and all these Civil List arrangements are only for the life of the Sovereign, and are carried into effect by Acts of Parliament. With this qualification, I entirely agree with the views taken by the learned Judges in the Court below, who considered this as a mere disguise for granting a pension under the name of an office; and I think that the third reason^(m) is quite apparent, and covers it most expressly, though I think one of the learned Judges intimates his opinion that the objection is not raised. It seems to me that this is clearly the grant of an annuity under the name of an office, and that annuity undoubtedly fell in upon the death of the Sovereign who granted it.

Lord *Brougham* :—I ought to mention to your Lordships that my noble and learned friend (Lord *Cottenham*) who is not now present, entirely agrees with my noble and learned friend and myself, in our view of the case. The main ground upon which I wished to look into the case was to see that that very objection was raised; for with respect to the pleadings, I thought that there must be some ground for the objection which was urged; but when we came to look at them, the word “disguise” put it out of question. I move that the interlocutors be affirmed.

The second appeal was accordingly dismissed, and the interlocutors therein complained of affirmed.

^(m) See the new ground of reduction, introduced into the second action, *supra*, p. 180.

SIR LUMLEY SAINT GEORGE SKEFFING- }
TON, Baronet - - - - - } *Appellant.*

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April 19.
May 2, 3. 9.
August 5.

THOMAS WILLIAM BUDD, CHARLES
HAYWARD BUDD, WILLIAM DAVIS;
BENJAMIN SHAW, WILLIAM GREEN,
CHARLES GREEN, HENRY GREEN,
THOMAS KING CREAK, WILLIAM
THOMPSON, ROBERT FARRAND, GEO. }
BARCLAY MANSEL, OLIVER VILE, } *Respondents.*
THOMAS HUTCHINGS WHITEHURST,
ABRAHAM WILDAY ROBARTS, HAR-
VEY COMBE, and WILLIAM GEORGE
PRESCOTT, Esqrs. - - - - - }

T. H., a merchant in partnership with *A. H.*, died in 1790, unmarried and intestate, possessed of leasehold property, and leaving his sisters Lady *S.* and Mrs. *D.* his sole next of kin. Soon after his death, the partnership was, on investigation by the creditors, found to be insolvent; and Lady *S.* and Mrs. *D.*, with consent of their husbands, duly renounced administration of his estate. By indenture made between Sir *W. S.* and his wife Lady *S.* of the first part, the said *A. H.* of the second part, and his then new partner *R.* of the third part,—after reciting that the former partnership was insolvent; that *A. H.* and *R.* had undertaken to settle with the creditors by composition, which could not be effected without administration of *T. H.*'s personal estate, and that there had been money transactions between him and Sir *W. S.*, of which neither kept any account,—Sir *W. S.* and Lady *S.* renounced, at *R.*'s request, all their right to the said administration in favour of *A. H.*, who in consideration thereof covenanted, after obtaining such administration, to release Sir *W. S.* from all claims which he as administrator of *T. H.* or otherwise might have on Sir *W. S.*: And Sir *W. S.*, in consideration of such release, covenanted for himself, his heirs, executors, and administrators, and for his said wife, that they, Sir *W. S.* and Lady *S.*, would, after such administration should be granted to *A. H.*, execute to him, his executors and administrators, a release of all claims whatsoever which they might have on him as administrator of *T. H.* or otherwise. The creditors also by a composition deed agreed to accept 15*s.* in the pound, payable by instalments by *A. H.* and *R.*, and to allow *A. H.* to take out administration of the estate of *T. H.* Afterwards *D.*,

Administrator de bonis non.
Next of Kin.
Equity of Redemption.
Lapse of Time.
Acquiescence.
Presumption of Release.

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the husband of Mrs. D., by a deed-poll,—after reciting that he had an unsettled demand against *T. H.*'s estate, and that the effects of the late partnership, together with his private estate, were insufficient to pay the partnership debts, and that the creditors entered into a composition and agreement with *A. H.* and *R.* as aforesaid,—declared that a bond for 1,000*l.* given to him by *A. H.* and *R.* pursuant to an agreement therein recited, should, when paid, be in full discharge of all sums of money due to him from *T. H.*, and of all claims whatsoever of him, *D.*, on the estate and effects of *T. H.* *A. H.* then took out letters of administration of *T. H.*'s estate, and, in order to pay the creditors, raised sums of money by annuities and mortgage on the said leasehold property, *R.* joining in the securities; but in 1793, being unable to pay the whole composition by what they had then received from the intestate's estate, they entered into further arrangements with the creditors, and soon afterwards dissolved partnership, *R.* remaining in exclusive possession of the leasehold premises, of which he afterwards purchased the fee simple, and dealing with them as his own for several years, without any interference by *A. H.*, or the said next of kin, or their husbands who survived them,—all of whom died between the years 1797 and 1815,—he (*R.*) mortgaged them in 1815 to secure debts due by him to *D.* and Co., subject to the leases possessed by the intestate, subject to which he also in 1818 released to them the equity of redemption, and they afterwards sold the property in fee to other parties. A bill to redeem the premises was filed against the mortgagees and purchasers in 1831, by an administrator *de bonis non* of *T. H.*, claiming title also as representative of the next of kin. There was no direct proof that *T. H.*'s next of kin executed releases of their interest in the residue of his estate.—

Held that it was immaterial whether such releases were executed or not, as the various acts of ownership exercised over the leasehold property by *A. H.* and by *R.* and those deriving under him, all dealing with it as their absolute property for a period of 37 years, with the acquiescence of the next of kin and their representatives, established beyond all doubt an agreement by the next of kin to give up all their interest in it, in consideration of the arrangements of 1790.

Seemle, if the residue had not been so released, and time and the acts and acquiescence of the parties had not been a bar to a bill to redeem, the administrator *de bonis non* of the intestate would be entitled to sustain such bill; notwithstanding that the equity of redemption had been reserved to the original administrator's representatives.

THIS was an appeal from a decree of the Court of Exchequer, by which a bill, filed by the Appellant, claiming to be entitled to redeem against the

Respondents, or persons whom they represent, certain leasehold property situated at *Bermondsey* in the county of *Surrey*, and formerly possessed by one *Thomas Hubbert*, was dismissed with costs.

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Thomas Hubbert, being in partnership with his natural son *Alexander Hubbert* in the business of ship and insurance brokers, at *London* and *Ostend*, and being possessed of part of the premises in question in the cause, by virtue of a lease dated the 23d of *June* 1788, for a term of 79 years from Lady-day 1783, and having an agreement dated the 21st of *January* 1790 for another lease of another part of the premises, from one *Thomas Carter* (who held a lease of all the premises, together with others, granted to him by the Earl of *Salisbury* on the 11th of *October* 1785 for a term of 80 years from the 25th of *March* 1782), died in *August* 1790 unmarried and intestate, leaving Dame *Catherine*, then the wife of Sir *William Skeffington*, Baronet, and *Anastasia*, wife of *Cornelius Donovan*, Esq., his sisters and only next of kin, surviving him. The Appellant is the only child and next of kin of Sir *William* and Lady *Skeffington*, both deceased,—the latter in 1811, the former in 1815,—and is the only next of kin of Mrs. *Donovan*, who died without issue in 1797, and is the residuary legatee and one of the executors of Mr. *Donovan*, who died in 1806. He is also administrator of Lady *Skeffington*, and administrator *de bonis non* of the said *Thomas Hubbert*, under letters of administration granted to him in 1828 and 1829, respectively.

It was found, soon after *T. Hubbert's* death, that the partnership business between him and *A. Hubbert* was much embarrassed, if not absolutely insolvent. On the 30th of *December* 1790, Lady *Skeffington* and Mrs. *Donovan*, with the consent of their husbands,

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executed a proxy of renunciation of administration of his effects in favour of *A. Hubbert* as a creditor of his estate. By an indenture dated the same day, and made by Sir *William* and Lady *Skeffington* of the first part, the said *A. Hubbert* of the second part, and *Thomas Rowcroft* (another natural son of *T. Hubbert*, and then taken into partnership by *A. Hubbert*) of the third part,—reciting, amongst other things, the death of *T. Hubbert*, and that Lady *Skeffington* and Mrs. *Donovan* were his sole next of kin, and that, upon looking into the affairs and concerns of the said *T.* and *A. Hubbert*, it appeared that their estates were not sufficient to pay the several creditors of the partnership, and that *A. Hubbert* and *Rowcroft* had undertaken and agreed to settle with the several creditors of the partnership by a composition or otherwise, but the same could not be effected without letters of administration being first granted of the personal estate of *T. Hubbert*: And further reciting that there had been several money transactions between Sir *W. Skeffington* and *T. Hubbert* in his lifetime, but that no account thereof had been kept by either party:—*It was witnessed* that Sir *William* and Lady *Skeffington*, in part performance of the agreement thereinbefore set forth, and at the request of *Rowcroft*, released and renounced unto *A. Hubbert* all the right, interest, and demand they or either of them had to letters of administration of the personal estate of *T. Hubbert*; and in further pursuance of the said recited agreement, and at the nomination and direction of *Rowcroft*, they by this indenture, as far as in them lay, authorised and empowered *A. Hubbert* to take out immediately administration of the goods, chattels, and credits of *T. Hubbert*: And it was further witnessed, that *A. Hub-*

bert, in pursuance and performance of his part of the said agreement, and in consideration of the said release and renunciation, and of his having such letters of administration granted to him as aforesaid, did thereby, for himself, his heirs, executors, and administrators, covenant and agree with Sir *W. Skeffington*, that he, *A. Hubbert*, would, immediately after such letters of administration should be granted to him, or within one month thereafter, execute and deliver unto Sir *William* a good and sufficient general release and discharge of all claims whatsoever, which he should or might have upon Sir *William*, his executors or administrators, as administrator of *T. Hubbert*, or otherwise: And it was further witnessed, that Sir *W. Skeffington*, in further performance of his part of the said agreement, and in consideration of such release so to be executed to him as aforesaid, did by this indenture, for himself, his heirs, executors and administrators, and for his said wife, covenant and agree with *A. Hubbert*, his executors and administrators, that they Sir *W.* and Lady *Skeffington* would, immediately after such letters of administration should be granted to *A. Hubbert*, or within one month afterwards, duly execute to him, his executors or administrators, a good and sufficient release of all claims and demands which they Sir *W.* and Lady *Skeffington*, or either of them, or their or either of their executors or administrators, should or might have upon him, *A. Hubbert*, as administrator of *T. Hubbert*, or otherwise.

By another indenture, dated the 31st of *December* 1790, and made between the said *A. Hubbert* of the first part, several creditors of the late partnership of the second part, and the said *T. Rowcroft* of the third part,—reciting, that in consequence of an investigation

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made into the affairs of the partnership of *T. and A. Hubbert*, both at *London* and *Ostend*, by a committee of the creditors, it was their opinion that it would be for the interest of the creditors to accept a composition of 15*s.* in the pound in full of their respective demands, payable by instalments in 6, 12, and 24 months; and that the said *A. Hubbert* and *Rowcroft* having proposed to give their promissory notes to the creditors for payment of that composition, upon the disposal and management of the estate being given up to them, the committee was further of opinion that it would be for the benefit of the creditors to accede to that proposal, and, upon *A. Hubbert* and *Rowcroft* giving their notes for such composition, to give up to them the sole disposal of the said partnership estate, and also of *T. Hubbert's* separate estate, *A. Hubbert* and *Rowcroft* engaging to satisfy all demands which might be made on the separate estate: And further reciting, that the creditors present at a meeting convened for the purpose had agreed to the said proposal, and resolved, on receiving the notes of *A. Hubbert* and *Rowcroft* for payment of the said composition, to execute to them a release of all demands on the said partnership and on the separate estate of *T. Hubbert*, and to give up all securities held by them in respect thereof: And further reciting, that the creditors of the partnership had acceded to the said resolution, except one, who was a bond creditor entitled to full payment out of *T. Hubbert's* separate estate, and also except such other of the joint creditors whose assent to the composition *A. Hubbert* and *Rowcroft* had taken on themselves the risk of obtaining: And further reciting, that *A. Hubbert* and *Rowcroft* had delivered to the several parties of the second part, their joint promissory notes for the payment of

the said composition by the aforesaid instalments, in full satisfaction of the debts due to them, and that the said several parties had given up the several securities held by them in respect thereof, on which *A. Hubbert* was liable to pay on having survived *T. Hubbert*:—
It was witnessed, that in pursuance of the said resolutions and agreements, the said *A. Hubbert* and *T. Rowcroft* did covenant to discharge the said promissory notes, and the parties of the second part did covenant to accept the same in full satisfaction of their several debts, and in consideration of the said notes and upon condition of the payment thereof, they did release *A. Hubbert* from all manner of action and demand which they might have against him as surviving partner of the said partnership, or against the heirs, executors, or administrators of *T. Hubbert* or his separate estate; and they, the aforesaid parties, did by this indenture, as far as they could, renounce respectively to *A. Hubbert* and *Rowcroft*, and to each of them, all their right and claim to the administration of the effects of *T. Hubbert*, to the intent that they, *A. Hubbert* and *Rowcroft*, or one of them, might apply for the same, as should be found expedient; and that they, or such one of them as should obtain administration, should get in the estate of *T. Hubbert*.

Mr. *Donovan*, in consequence of certain claims made by him upon the separate estate of *T. Hubbert*, which had not been satisfactorily adjusted, declined to execute any release of that estate until the 11th of *January* 1791. By a deed-poll of that date, executed by *Donovan*,—reciting, among other things, that he and *T. Hubbert* had carried on business in partnership as merchants for several years previous and up to 1780, when that partnership was dissolved, and that at the time of its dissolution no account was

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made up between them; and that *Donovan* had, some time in the year 1787, delivered to *T. Hubbert* an account of his receipts and payments in respect of their partnership, in which it was stated that *T. Hubbert* was indebted in respect thereof to *Donovan* in the sum of 2,200*l.*, and that that balance had not been settled or agreed to by *T. Hubbert* up to the time of his death: And further reciting that *T. Hubbert* had for several years previous to his death carried on business in partnership with *A. Hubbert*; and that upon a statement of the affairs of the last-mentioned partnership after *T. Hubbert's* death, it was found that the effects of that partnership, together with *T. Hubbert's* separate estate, were insufficient to discharge the whole of the debts due from that partnership: And further reciting the proposal of *A. Hubbert* and *Rowcroft* to pay the aforesaid composition, and the several other matters recited and stipulated by the said indenture of the 31st of *December* 1790: And further reciting that *Donovan* had claimed to be a creditor on the private estate of *T. Hubbert* for 2,300*l.*; but the same having been objected to by *A. Hubbert*, and the whole estates of *T. Hubbert* being insufficient to pay the debts due from him at the time of his decease, he, *Donovan*, had proposed to *A. Hubbert* to accept the sum of 1,000*l.*, payable by instalments of 100*l. per annum*, in full satisfaction of the said sum of 2,300*l.*, and of all other claims and demands which he, *Donovan*, had, or his executors or administrators might have, against the estate and effects of *T. Hubbert*, on *A. Hubbert* and *Rowcroft* executing a bond to him to secure the payment of the said sum of 1,000*l.*: And further reciting that *A. Hubbert* and *Rowcroft*, having agreed to such proposal, had accordingly executed such bond of even date with

this deed-poll :—*It was declared by Donovan* that the said bond, when paid pursuant to the condition thereof, should be in full satisfaction of all and every sum and sums of money due from *T. Hubbert* to *Donovan*, on account of the said partnership business so by them carried on as aforesaid, or any other account whatsoever, and of all claims and demands whatsoever of him, *Donovan*, on the estate and effects of *T. Hubbert*.

In *February* 1791, *A. Hubbert* took out administration of the goods, chattels, and credits of *T. Hubbert*; and on the 7th of *March* following, the agreement which *T. Hubbert* had entered into with *Carter* for a lease of part of the premises at *Bermondsey*, was carried into execution by an indenture of lease of that date, made between *T. Carter* of the one part, and *A. Hubbert*, therein described as administrator of the goods of *T. Hubbert*, of the other part. By that indenture, *A. Hubbert* entered into covenants, in pursuance of former covenants entered into by his lessor *Carter* with the Earl of *Salisbury*, to lay out certain sums (amounting to about 2,000*l.*) in building upon the premises.

The partnership business of *A.* and *T. Hubbert* was continued after *T. Hubbert's* death by *A. Hubbert* and *Rowcroft*, who took possession of the partnership effects and of the said leasehold premises. In order to pay off part of the composition agreed upon by the indenture of 31st *December* 1790, as they alleged, they borrowed 4,000*l.* of a *Mrs. Spriggs*, by way of annuity of 420*l.*, payable to her for her life, and secured by an indenture of the 16th of *July* 1791, made between *A. Hubbert*, of the first part; *Rowcroft*, of the second part; *Mrs. Spriggs*, of the third part; and *Sir John Lubbock*, of the fourth part; whereby,—after reciting certain leases and other instruments affecting

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divers leasehold properties belonging to *T. Hubbert*, and that he died intestate, and letters of administration of his effects were granted to *A. Hubbert*, as a creditor of *T. Hubbert*, whereby the several leasehold premises before mentioned became, and then were, legally vested in him, in possession, as administrator as aforesaid, for the residue of the several terms for which the said leaseholds were respectively holden: And further reciting the indenture of lease of the 7th of *March* 1791, and that *Mrs. Spriggs* had contracted with *A. Hubbert* and *Rowcroft* for the purchase of the said annuity at the price of 4,000*l.*, which sum had been accordingly paid by her, and that the annuity had been secured by the joint bond and warrant of attorney of *A. Hubbert* and *Rowcroft*:—*It was witnessed*, that for more effectually securing the regular payment of the annuity, *A. Hubbert* and *Rowcroft* did grant and confirm the same to her for her life, to be chargeable on the premises comprised in the said indenture of *March* 1791: And it was further witnessed that *A. Hubbert* did assign the said premises to Sir *J. Lubbock* for the residue of the term existing therein, in trust for securing the annuity, and subject thereto, in trust for *A. Hubbert*, his executors, administrators, and assigns. And this indenture contained a power of sale by Sir *J. Lubbock*, his executors, &c., in case default should be made in payment of the annuity for the space of twelve months next after any of the days appointed for the payment thereof.

In the same year and for the like purpose, *A. Hubbert* borrowed 1,500*l.* of a *Mrs. Smith*; and by an indenture dated the 2d of *December* 1791, and made between *A. Hubbert*, of the first part; *Rowcroft*, of the second part; and *Mrs. Smith*, of the third part,—reciting the indenture of lease of the

23d of *June* 1788, and the death of *T. Hubbert*; and that letters of administration of his effects had been duly granted to *A. Hubbert*; and that he had paid sundry debts and given security for a composition in satisfaction of divers of the debts of *T. Hubbert*; and that having immediate occasion for the sum of 1,500*l.* the better to answer the purposes of the said administration, he, *A. Hubbert*, together with his partner in trade, the said *Rowcroft*, as his surety, had applied to Mrs. *Smith* to lend him such sum, for which he and *Rowcroft* had given their joint bond of even date with those presents:—*It was witnessed*, that in consideration of the said sum of 1,500*l.* paid to *A. Hubbert* by the said Mrs. *Smith*, he, *A. Hubbert*, did assign unto her all the premises comprised in the lease of the 23d of *June* 1788, to hold to her, her executors, administrators and assigns, for the residue of the term comprised in the said lease, upon trust for securing payment of principal and interest of the said sum according to the condition of the bond, and in default thereof, in trust for sale and satisfaction; subject nevertheless to a proviso for redemption, on payment by *A. Hubbert* and *Rowcroft*, their heirs, executors or administrators, or any of them, to the said Mrs. *Smith*, her executors, &c., of the said sum of 1,500*l.* and interest, at the days and times, and in the manner mentioned in the condition of the bond.

By an indenture, dated the 27th of *March* 1793, and made between *A. Hubbert*, of the first part; the several persons executing that indenture, and therein mentioned to be creditors of *T. Hubbert* and *A. Hubbert*, of the second part; and *Rowcroft*, of the third part,—reciting the indenture of the 31st of *December* 1790, and that all or the greater part of the creditors

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of *T. Hubbert* had executed the same, and that the estate and effects of the late partnership, then received, had not produced sufficient to pay the several creditors of the said partnership the several instalments stipulated to be paid by the said indenture, and that *A. Hubbert* and *Rowcroft* had paid to the several creditors 11s. 3d. in the pound, in part of the composition of 15s., on the amount of their debts; and that said sum of 11s. 3d. in the pound exceeded the sum which had been received from the estate and effects of the said late partnership, by 2,500l.: And further reciting that *A. Hubbert* and *Rowcroft*, having been unable to pay the remaining 3s. 9d. in the pound in discharge of their promissory notes, had convened a meeting of the creditors and laid before such meeting a particular account of the monies received from the estate and effects of the late partnership and of *T. Hubbert*, and also a particular account of the outstanding debts and effects due and belonging to the same; and that *A. Hubbert* and *Rowcroft* proposed to the creditors to pay them the remaining 3s. 9d. in the pound with two years' interest, by equal instalments, in six years from the 1st of *January* 1793, in case the outstanding debts and effects and the sum of 2,000l., which they proposed to add thereto out of their own proper monies, would extend to pay the same, and if not, then so much of the said sum of 3s. 9d. in the pound and of the said two years' interest, as the said outstanding debts and effects and the said sum of 2,000l. would extend to pay; and that the creditors should then give up the said promissory notes, and release *A. Hubbert* and *Rowcroft* from their covenant for the payment thereof: And further reciting that the creditors present at the said meeting had agreed to the

said propositions, and that the several parties to this indenture had delivered up their promissory notes:—*It was witnessed, &c.* Then followed covenants by *A. Hubbert* and *Rowcroft* with the creditors to carry the proposed arrangement into execution, and a covenant by the creditors to accept that arrangement, and a declaration that, on due performance of the said covenants by *A. Hubbert* and *Rowcroft*, the creditors did thereby release the joint estate of *T.* and *A. Hubbert*, and the separate estate of *T. Hubbert*, from all actions and demands whatsoever.

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Shortly after the completion of the arrangement effected by this deed, *A. Hubbert* and *Rowcroft* dissolved partnership, the former returning to *Ostend* (where he generally resided) for the purpose of winding up the partnership affairs there, and the latter remaining in possession of the leaseholds and other partnership property in *England*.

After the dissolution of the partnership, *A. Hubbert* did no act to affect the leasehold premises, not even executing any assignment of the leases to *Rowcroft*; and in 1806 he died intestate and insolvent.

In 1795, *Mrs. Smith* called in the 1,500*l.* advanced by her on mortgage of the premises comprised in the lease of the 23d of *June* 1788, which sum was paid off by *Rowcroft*; and by his direction, *Mrs. Smith* assigned the mortgaged premises to the Respondent *William Davis*, in trust for *Rowcroft*, by an indenture dated the 2d of *December* 1795; and *Davis*, by a deed of even date with that indenture, declared the trusts of such assignment to be for *Rowcroft*.

In the year 1797, *Rowcroft* and *Thomas Carter* purchased from Lord *Salisbury*, for 2,640*l.*, the free-

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hold and inheritance of the premises comprised in *Carter's* lease of the 11th of *October* 1785, together with a small piece of ground not included therein; and the same were conveyed to a trustee for them, in equal moieties. They afterwards made partition of the purchased premises by indentures of lease and release dated *August* 1797, under which so much of the purchased property as was comprised in the leases of the 23d of *June* 1788 and 7th of *March* 1791 was conveyed to the use of *Rowcroft*, his appointees, heirs, and assigns.

In the year 1805, *Rowcroft* being indebted to his bankers, Messrs. *Smith, Payne & Smith*, deposited with them the title-deeds of the freehold premises so vested in him, and executed to them a deed-poll, dated the 31st of *January* 1805, by which,—after reciting the said indenture of *August* 1797, and that *Rowcroft* had laid out a large sum of money in making erections and improvements on the premises, and that the said premises, or part thereof, were subject to the indentures of lease of the 11th of *October* 1785 and the 23d of *June* 1788: And reciting the death of *T. Hubbert*, and that *A. Hubbert* had taken out letters of administration to his effects, and that he, *A. Hubbert*, was justly indebted to *Rowcroft* in the sum of 7,878*l.* and upwards: And reciting that *Rowcroft* was indebted to the firm of *Smith, Payne & Smith*, in the sum of 15,000*l.*, and that he had deposited with them the title-deeds, &c. as a security for the repayment of the said sum, and had also agreed, as a further security, to assign to them the said debt owing to him by *A. Hubbert*,—*Rowcroft* covenanted, and also directed and appointed, that the hereditaments comprised in the indentures of lease and release of *August* 1797 and the said lease of *June*

1788 should be charged with the payment of the said sum of 15,000*l.*; and he thereby also assigned unto *Smith, Payne & Smith*, all sums of money owing to him by *A. Hubbert*, whether in his own right or as administrator of the effects of *T. Hubbert*.

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This debt of 15,000*l.* was afterwards paid off by *Rowcroft*, and the deed-poll was delivered up to him and cancelled.

In the years 1802 and 1805, *Rowcroft* charged the hereditaments comprised in the lease of the 23d of *June* 1788, with two annuities payable to a *Mrs. Logie* for the term of her life; and in 1807, while the annuities to *Mrs. Spriggs* and *Mrs. Logie* were still subsisting, he being indebted to the said *W. Davis* and his partners, in a large sum of money, for the purpose of securing the payment thereof deposited with them the title-deeds relating to the freehold of the premises, and also the lease of the 23d of *June* 1788, and an attested copy of *Carter's* lease of the 11th of *October* 1785, and executed to them a deed of charge, dated the 13th of *August* 1807.

In the year 1815, the debts due to *Davis* and Co. still remaining unpaid, they, under a covenant contained in the deed of charge for that purpose, called upon *Rowcroft* for better security; and accordingly, by indentures of lease and release, dated respectively the 18th and 19th days of *January* 1815, *Rowcroft* conveyed to them the hereditaments and premises vested in him under the partition deed of *August* 1797, upon trust for sale, subject to the annuities of *Mrs. Logie* and *Mrs. Spriggs*, and to the leases of the 11th of *October* 1785 and 23d of *June* 1788. Soon after the execution of these deeds the premises were put up to public sale, but were bought in, no sale having been effected. *Rowcroft*, in the year 1818, released his equity of redemption in the premises to

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Davis and Co., and the same were duly conveyed to them by indentures of lease and release of the 22d and 23d of *June* 1818, subject to the said annuities and to the leases of the 11th of *October* 1785 and 23d of *June* 1788, and to the several terms thereby demised.

The annuitant, Mrs. *Logie*, died in 1821; Mrs. *Spriggs*, the other annuitant, died in 1824, in which year *Rowcroft* also died, having appointed *Thomas Whitehurst* and *Thomas Hayward Budd*, both since deceased, his executors.

In the year 1822, *Davis* and Co. sold and conveyed to *Robert Farrand* part of the premises (of which they had obtained the equity of redemption by the indentures of *June* 1818); and in 1825 they sold the remainder to *William Thompson*. On occasion of the latter sale, the conveyancer to whom the abstract of title was submitted on *Thompson's* behalf, objected that the terms created by the leases of *June* 1788 and *March* 1791 had never been assigned to *Rowcroft*, and were still outstanding, and he required that letters of administration *de bonis non* to *T. Hubbert* should be taken out for the purpose of supplying this defect in the title by a proper assignment. The Appellant having, in consequence of this requisition, been applied to on behalf of the purchaser in *June* 1826, and having refused to concur in the request made to him (viz. that he should renounce any right he might have to administration as the nearest of kin to *T. Hubbert*), application was made to the Prerogative Court for a grant of administration to a nominee of the said vendors, to which the Court acceded upon a full statement of the facts of the case, but without citation of the Appellant; and accordingly administration, limited to *T. Hubbert's* interest in the terms demised by the leases in question, was in *March* 1827 decreed to *Henry John White* as such nominee, by whom as such adminis-

trator these terms were duly assigned to the respective purchasers.

The Appellant having obtained a revocation of the letters of administration granted to *White (a)*, and having in *November 1829* procured letters of administration to be granted to himself of the goods and effects of *T. Hubbert* left unadministered by *A. Hubbert*, he filed his original bill in the Court of Exchequer in *May 1831*, whereby as such administrator, and also as administrator and only child of Lady *Skeffington* and as executor of Mr. *Donovan* (as stated *supra*, p. 221), he claimed to be entitled to the legal and beneficial interest in the leases of the 23d of *June 1788* and of the 7th of *March 1791*, on payment of what was due to *Rowcroft*, or his assigns, on security thereof. The bill charged that *Rowcroft* was not the absolute owner of the leases, but a mere incumbrancer thereon, in respect of the debts which he had paid; that he had so treated and described himself, particularly in the deeds and transactions with *Smith, Payne & Smith*, in 1805, and with the Respondents *Davis and Co.* in 1807; that he had kept accounts as mortgagee down to the period of the sale in 1818, within 20 years of the filing of the bill, and that in such sale he expressly excepted the leases; that he did not, and could not, acquire or confer any title thereto, especially as there was a suspension of all representation to *T. Hubbert*, from the death of *A. Hubbert* until long after the sale to *Davis and Co.*; and that in the proceedings in the suit in the Ecclesiastical Court, the latter put their title not on the footing of adverse possession, but on the ground of more debts of *T. and A. Hubbert* having been paid by *Rowcroft* than the whole value of the leases.

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(a) See *Skeffington v. White*, 2 Hagg. Ecc. Rep. 626.

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To that bill, the defendants materially interested, namely, *Davis* and Co. (*b*), and the purchasers from them, *Farrand* and *Thompson*, put in two general demurrers, for want of equity. These demurrers were overruled by Lord *Lyndhurst*, C. B., in *Michaelmas* term 1831, on the ground of the beneficial interest alleged by the bill to be vested in the Appellant, in respect of the residue of *T. Hubbert's* estate.

The bill was afterwards twice amended, pursuant to orders dated respectively the 20th of *December* 1831 and the 10th of *August* 1833; and as so amended, it stated, among other things, the lease of 1785 to *Carter*; the lease by him to *T. Hubbert*, in *June* 1788; the agreement between them in *January* 1790 for another lease, and the lease granted pursuant to such agreement to *A. Hubbert* in *March* 1791; and the deed of the 31st of *December* 1790, between the creditors and *A. Hubbert* and *Rowcroft*: Omitting all mention of the deeds of *December* 1790 and *January* 1791, executed by Sir *William* and Lady *Skeffington* and by Mr. *Donovan*, it stated, with respect to the proxy of renunciation of administration of *T. Hubbert's* effects by his next of kin, to this effect: that the affairs of *T.* and *A. Hubbert* being at the death of *T. Hubbert* in a very complicated state, Lady *Skeffington* and Mrs. *Donovan*, the better to enable *A. Hubbert* to settle and arrange the

(*b*) *Davis* and Co. included, besides the Respondents *Davis* and *Shaw*, their late partners, Sir *Charles Flower*, since deceased, now represented by the Respondents *Robarts*, *Combe*, and *Prescott* and *John Green*, also deceased, now represented by the Respondents *William*, *Charles*, and *Henry Green*. The other Respondents, viz. *T. W. Budd*, *C. H. Budd*, *Vile*, and *T. H. Hutchings*, representing the deceased executors of *Rowcroft*; *Mansel*, representing *A. Hubbert*, under letters of administration granted to him in 1831: and *Creak*, formerly a tenant of part of the premises under *Davis* and Co., and which part they sold to *Farrand* subject to *Creak's* lease, claimed no interest in the cause, and did not appear in the appeal.

mercantile affairs of *T. Hubbert*, did, at the particular request of *A. Hubbert*, renounce their right to the letters of administration of the goods, chattels, and credits of the said *T. Hubbert*.

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The bill then stated that *A. Hubbert*, as a creditor of *T. Hubbert*, took out letters of administration of his effects, and becoming possessed, as such administrator, of the leasehold premises comprised in the leases of *June 1788* and *March 1791*, he and his partner, *Rowcroft*, charged the premises comprised in the latter lease with the annuity of 420 *l.* to Mrs. *Spriggs*, and mortgaged the premises contained in the former lease to Mrs. *Smith*, by the two deeds of *July* and *December 1791*; and—after stating the second composition deed with the creditors, and other deeds and instruments executed by *Rowcroft* (as before recited), and charging to the effect before stated (p. 235), and that the Appellant was kept wholly ignorant of his rights, until the said application to him in 1826,—the bill prayed, among other things, that the Appellant might be declared entitled to redeem the said premises upon paying what, if anything, remained due in respect of the *lien* or incumbrance of *Rowcroft* thereon; and that an account might be taken of what was due in that respect for principal and interest, and also of the rents and profits of the premises received by *Rowcroft* and the defendants, &c.; and that the defendants might be ordered to re-assign the premises to the Appellant.

The defendants to the bill put in their answers, some jointly and others separately; the principal defendants, *Davis* and Co. and *Farrand* and *Thompson*, insisting that they held the premises by purchase, free and discharged from all right of redemption. The material grounds of defence relied on by them

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were, that *A. Hubbert* and *Rowcroft*, under the arrangements made by them with the creditors and next of kin of *T. Hubbert*, became entitled, as purchasers, to the premises in question; that such arrangements were for many years acquiesced in and acted upon by those under whom and in whose right the Appellant claimed; and that, supposing *A. Hubbert* and *Rowcroft* ever to have held the premises subject to any right of redemption, all such right was barred long before the filing of the bill, by length of time, laches, and adverse possession.

A great deal of documentary and other evidence was produced, both on the part of the Appellant and of the principal Respondents, *Davis* and Co., and *Farrand* and *Thompson*, from which it appeared that all the transactions relative to the composition with the creditors of *T.* and *A. Hubbert* took place with the full knowledge of Sir *W.* and Lady *Skeffington*, their interest being attended to by Mr. *Donovan*, who acted on their and his own behalf; and it was proved that *Rowcroft* was in the exclusive possession of the property, and that, although he appeared in the deeds before recited as mortgagee or incumbrancer only, still he acted as absolute owner, expending large sums in building on it, from the dissolution of the partnership between him and *A. Hubbert* in 1793, until the year 1818, when the sale to *Davis* and Co. took place. There was no evidence of any interference with the property at any time, on the part of the next of kin or their husbands; but no deed of release, nor evidence of the execution of any such deed, pursuant to the covenants in the deed of the 30th of *December* 1790, was produced. It was proved that several deeds that had been in the possession of *Rowcroft* were destroyed or lost, and an

entry in a deceased attorney's bill-book of costs against Mr. *Donovan* was admitted in evidence to show that he (the attorney) had prepared for execution mutual general releases between Sir *William* and Lady *Sheffington* on one side, and *A. Hubbert* on the other.

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The cause was heard before Mr. Baron *Alderson*, who delivered his judgment in *February* 1838, dismissing the Appellant's bill, with costs. (The case is reported 3 Y. & C. 1 *et seq.*)

The appeal was against that decree.

Mr. *Pemberton* and Mr. *Swanston* (with whom was Mr. *Lovat*), for the Appellant:—The two leases of the 23d of *June* 1788, and the 7th of *March* 1791, were at the death of *Alexander Hubbert*, and they still are, assets of the intestate *Thomas Hubbert*, remaining unadministered; and the Appellant, in one or more of the characters with which he has clothed himself, is entitled to redeem them. It is not even pretended that *Thomas Rowcroft* ever purchased these leases; it appears, in his alleged purchase of the freehold and inheritance of the premises, that he purchased the same subject to these leases; and that he never was, nor ever claimed to be, owner of the leases; but, on the contrary, treated himself as a mortgagee or incumbrancer on them.

The renunciation of administration by the intestate's sisters in favour of *A. Hubbert*, did not release their beneficial interest in his estate. The alleged transactions between the next of kin of *T. Hubbert* and *A. Hubbert* and *Thomas Rowcroft* were not such, as, if established by evidence, would afford any defence to the claim of the Appellant as administrator *de bonis non* of *T. Hubbert*. These transactions, so far as they appeared in evidence, did not confer on

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A. Hubbert and *Rowcroft*, or either of them, any beneficial interest in the leases beyond the extent of any incumbrance which became justly due to them on the premises comprised in the leases. The intestate's interest in them was never transferred. It is quite clear that *A. Hubbert* did not dispose of it, and that *Rowcroft* did not, in his transactions with the Respondents *Davis* and *Shaw* and their partners, sell the leasehold interest to them, nor had he power to do so ; nor did they contract, or pretend to contract, for the purchase of it. Previously to their alleged purchases, they had notice that *Rowcroft* could not make a title to the leases, and was only mortgagee or incumbrancer on them. The deeds executed to them, and the recitals in them, show expressly that *Rowcroft* assigned his interest subject to the leases of 1785 and 1788. It appears also that, previously to the alleged indenture of lease made by them to the Respondent *Creak* on the 26th of *November* 1818, he had notice of the two leases of the 23d of *June* 1788 and the 7th of *March* 1791 ; and that neither *Rowcroft*, nor the Respondents *Davis* and *Shaw* and their partners, could make a title to them.

It must be assumed that, previously to the alleged indenture of assignment by *Creak* to the Respondent *Farrand* on the 13th of *November* 1818, he had notice of the same two leases, and that neither *Rowcroft*, nor *Creak*, nor *Davis* and *Shaw* and their partners, could make a title thereto. And it must be likewise assumed that, previously to the subsequent alleged purchases by *Farrand* and by the Respondent *Thompson*, they had notice of the said two leases, and that neither *Rowcroft*, nor *Davis* and partners, could make a title thereto ; the recitals in the deeds show that they could not. The leases were

treated throughout as subsisting leases, and the equity of redemption now vested in the Appellant was admitted. There was no allegation in any of the answers of the defendants, that any deed of release had been executed by Sir *William* and Lady *Skeffington*, of their beneficial interests in the estate of *Thomas Hubbert*; and no evidence ought to have been admitted to prove the execution of any such release. The entry in the book of Mr. *Trundle*, the deceased solicitor, charging *Donovan* with the costs of such releases, was not admissible evidence, and ought to be now considered as if it had been rejected. Even if admissible, it did not prove that any such releases had been executed. Neither was it alleged that any release had been executed by Mr. and Mrs. *Donovan*, or either of them, of Mrs. *Donovan*'s interest in *Thomas Hubbert*'s estate, except the alleged deed-poll by Mr. *Donovan* of the 11th of *January* 1791. That deed-poll was not a release of the beneficial interest of either Mr. or Mrs. *Donovan*, in the intestate's estate: it was only a compromise of Mr. *Donovan*'s own claims for an unsettled balance of account.

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The *Solicitor-general*, Mr. *G. Turner*, and Mr. *H. W. Busk*, appeared for *Davis* and *Shaw*, and the other Respondents representing their deceased partners Sir *C. Flower* and *John Green*.

Mr. *Simpkinson* and Mr. *G. Richards* appeared for the Respondents *Farrand* and *Thompson*.

The *Solicitor-general* stated that these two sets of Respondents were heard separately by their respective counsel in the Court below, and expected to have their cases argued by their respective counsel at this bar.

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Lord *Brougham* (who presided in the absence of the Lord Chancellor) said the rule at this bar was to hear only two counsel for any number of Respondents, unless they had adverse interests, or there was some very distinct ground of argument for some, adverse or not applicable to the others.

The *Solicitor-general* said, all the argument that could be urged for those for whom he appeared, would be common also to *Farrand* and *Thompson*, as purchasers under *Davis* and Co.; but *Farrand* and *Thompson* had further to maintain that they were *bond fide* purchasers—being purchasers within 20 years—without notice of the leases.

Lord *Brougham* said, he did not see any such distinction between the cases of the Respondents as to justify an infringement of the rule (c).

The *Solicitor-general* and Mr. *Turner* accordingly argued the case for all the Respondents:—*Alexander Hubbert* and *Thomas Rowcroft*, under the arrangements made by them with the creditors and with the next of kin of *Thomas Hubbert*, became entitled as purchasers to the leasehold premises in question. These arrangements were for upwards of 35 years acquiesced in and acted upon, as well by the Appellant himself as by those under whom and in whose right he claimed; and no case was alleged in the bill, or proved on the part of the Appellant, entitling him, either for his own benefit, or as administrator *de bonis non* of *T. Hubbert*, to set aside those arrangements and the subsequent dealings with the property.

But supposing *A. Hubbert* and *Rowcroft* not to

(c) For the rule on this point, see the cases of *Horne v. Pringle* and *Hunter*, and *Huig v. Homan*, Vol. VIII., *ante*, pp. 281-2, and 359.

have become entitled to the leasehold premises as purchasers under the arrangements referred to, and supposing *Rowcroft*, by whom alone those premises were afterwards held, ever to have held them subject to any right of redemption, such right of redemption never vested in the Appellant as the administrator *de bonis non* of *T. Hubbert*, and all right to redeem the premises was, long before the filing of his bill, barred by length of time, laches, and adverse possession.

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The parties in whose right the Appellant claimed had relinquished and released all interest in the estate of *T. Hubbert*. If the evidence of the existence of the releases was not quite satisfactory, the House ought to presume them. Courts of Law presume a release after 20 years of adverse possession.

The Appellant has not brought before the Court the proper and necessary parties for entitling him to claim the relief prayed by the bill, in respect of any beneficial interest he may have in the residue of *T. Hubbert's* estate, if there had been any residue. The Appellant is only one of the executors of Mr. *Donovan*, and there is not before the Court any representative of Sir *W. Skeffington* or of Mrs. *Donovan* (d).

Lord *Cottenham*:—I have no hesitation in advising your Lordships to affirm the decree in this case. The August 5.

(d) It has been deemed unnecessary to give more than a mere outline of the arguments on each side, in consequence of the full report of the arguments by the same counsel in the Court below. No new argument was now urged. The new cases cited were:—*Bonney v. Ridgard*, 1 Cox, 145; *Reeks v. Postlethwaite*, G. Cooper, 161; *Webster v. Webster*, 10 Ves. 93; *Rhodes v. Smeethurst*, 4 Mees. & W. 42, and 6 Mees. & W. 351; *Pease v. Hewitt*, 7 Sim. 471; *Ex parte Glyn*, 1 Mont. D. & D'Gex, 29; *Clough v. Dixon*, 10 Sim. 564; *Nicholson v. Hooper*, 4 Myl. & C. 179; *Loy v. Duckett*, Cr. & Ph. 305; *Page v. Broom*, 3 Beav. 36.

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grounds upon which I have formed my opinion against the title of the plaintiff, make it necessary to observe upon many of the points urged in the argument.

The plaintiff sues as administrator *de bonis non* of the estate of *Thomas Hubbert*, who died in 1790, under letters of administration granted to him in 1829. I take no notice of the alleged title of the plaintiff as only child of Lady *Skeffington*, one of the two next of kin of *Thomas Hubbert*; because, in the view I take of the case, the title of the plaintiff would not be improved if he were in a situation to stand upon such right as belongs to the next of kin of *Thomas Hubbert*.

It was argued that, as the plaintiff was invested with the office of representative of *T. Hubbert*, a Court of Equity had no further duty to perform than to inquire whether the property in question constituted part of his estate. From this proposition I entirely dissent. It is not in dispute that the plaintiff is not seeking to possess himself of the property for the purpose of administering it among creditors, but for the next of kin. If, therefore, the next of kin have no title, the Court will not assist the personal representative to recover property, the title to which those, for whom he would be trustee of it, if recovered, have long since parted with and abandoned. The case in this respect is to be considered in the same light as if *Alexander Hubbert*, the original administrator in 1791, were still living, and the suit were by the next of kin of *T. Hubbert* against him as such administrator. The plaintiff's case cannot be better than would be the title of the plaintiff in such a suit; and a very short reference to the transactions in evidence will show how destitute of foundation would be the claim of such next of kin.

Thomas Hubbert, the intestate, a partner in busi-

ness with *Alexander Hubbert*, died in 1790, possessed of the lease of 1788, and a contract of 1790 for another lease, which constitute the property sought to be recovered in this suit. The partnership is proved to have been insolvent. Soon after the death of *T. Hubbert*, the creditors of the late firm agreed to accept 15*s.* in the pound, secured to them by *A. Hubbert*, the surviving partner, and *Thomas Rowcroft*, who had joined the former in his business, and to release the joint estate and the separate estate of the deceased *T. Hubbert*, and to renounce the right to administration in favour of *A. Hubbert*. Lady *Skeffington* and Mrs. *Donovan*, the two next of kin of the deceased *T. Hubbert*, were privy to the arrangement, and they also renounced administration in favour of *A. Hubbert*, who obtained letters of administration in 1791.

By indenture of the 30th of *December* 1790, which recited that there had been money transactions between the deceased and Sir *W. Skeffington*, the husband of one of the next of kin, *A. Hubbert*, the intended administrator, agreed to release Sir *W. Skeffington* from any balance that might be due from him to the estate; and he and Lady *Skeffington* agreed to release the estate from any claim which they or either of them might have. Mr. *Donovan*, the husband of the other next of kin, by a deed dated the 11th of *January* 1791, after reciting that he claimed to be a creditor upon the estate of the deceased, and had agreed to accept a bond from *A. Hubbert* and *Rowcroft* for 1,000*l.*, agreed to accept payment of that sum in full of all sums owing to him from the estate of the deceased, and of all claims and demands whatsoever of him, *Donovan*, on the estate and effects of the deceased.

It was much discussed whether those releases were to be confined to the money transactions between Sir

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W. Skeffington and *Mr. Donovan* respectively and the deceased, or whether they were to include their claims in right of their wives as next of kin. I think it unnecessary to come to any decision upon this, because *Mr. Kaye* (a witness in the cause) has proved that *Mr. Donovan* acted for himself and the other next of kin, *Sir William* and *Lady Skeffington*; and that it was understood and agreed by them all, that in consideration of this arrangement with the creditors, *A. Hubbert* and *Rowcroft* should become entitled to all the property of the deceased. If, therefore, these releases applied to the interest of the next of kin in the property, they would be conclusive against the claim of the plaintiff; and if they did not, then the evidence of *Mr. Kaye* proves a distinct and independent contract, which, coupled with the subsequent dealings of the parties, is equally fatal to the plaintiff's case.

On the 27th of *March* 1793, another composition deed was executed with the creditors, by which, after reciting that the property had not produced the 15*s.* in the pound, *A. Hubbert* and *Rowcroft* agreed to advance 2,000*l.* of their own; in consideration of which, the creditors agreed to give up what remained due of the 15*s.* These transactions are quite inconsistent with any idea that *A. Hubbert* and *Rowcroft* were not to be owners of the estate, but were to be responsible for it at some future time to the next of kin. *Mrs. Donovan* died in 1797, and her surviving husband in 1806, to whom the plaintiff and another are executors. *Lady Skeffington* died in 1811, and her surviving husband in 1815; but his representative is not before the Court. If the transactions of 1790 and 1791 did not deprive the next of kin of all interest in the estate of the deceased, the absence of all claim by *Mr. Donovan* up to his death in 1806, and of the plaintiff, as his executor, since that time, and of *Sir W. Skeffington* up to

his death in 1815, is wholly unaccounted for. But the case does not rest upon the absence of all claim on behalf of the next of kin during these long periods, but upon the acts of ownership on the part of *A. Hubbert* and *Rowcroft*, during the same period; the effect of which is not diminished by the circumstances relied upon by the plaintiff; such as that *A. Hubbert* was in some of the deeds described as personal representative of *Thomas Hubbert*. As between himself and those with whom he was dealing, that was his best and most simple title, and quite consistent with his having, by an arrangement with the creditors and next of kin, made the property his own. It is not necessary to go through those several acts of ownership, or to observe upon them further than this, that many of them are irreconcilable with the idea that *A. Hubbert* and *Rowcroft* could have supposed themselves as holding the property otherwise than as owners. I think that the direct evidence and the conduct of the parties during a period of 40 years, established, beyond all doubt, the fact of an agreement by the next of kin, in consideration of the arrangement of 1790, to give up and abandon all title to the property of the deceased *T. Hubbert*, as next of kin; and that upon the faith of that arrangement, the defendants and those through whom they claim have been dealing with the property ever since the years 1790 and 1791, and from the commencement incurred large personal responsibilities. Whether releases were actually executed or not, appears to me to be quite immaterial. It is therefore unnecessary to observe upon any other parts of the case. The bill was, I think, properly dismissed with costs; and I move your Lordships that this appeal be dismissed, and with costs.

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Lord *Brougham*:—I entirely agree with my noble and learned friend, on the grounds upon which he has moved your Lordships to dismiss this appeal, and to affirm the decree of the Court of Exchequer. My noble and learned friend and myself were of opinion, during the argument, that in certain of the grounds on which the learned Judge had founded his decree in the Court below, we could not concur; but on the grounds which my noble and learned friend has now stated, it seems to me that the decision of the Court below was right, and ought to be affirmed.

Lord *Campbell*:—I agree in the opinion that the decree ought to be affirmed, but not on the first ground taken by Mr. Baron *Alderson*; that, although there might be a right to redeem, the bill to redeem could not be maintained by the plaintiff as administrator *de bonis non* of *T. Hubbert*, and that the right to redeem was only in the representative of *A. Hubbert*, the administrator, who had mortgaged. The learned Judge supposed all remedy to the administrator *de bonis non* specifically to follow the estate, was gone; that he could not have a reconveyance, and that he could only call on the representative of the administrator to account for the benefit of the next of kin. I cannot agree to this doctrine. If an action at law were to be brought on the mortgage deed, it could only be in the name of the personal representative of the administrator. The covenants are with the mortgagor, his executors and administrators. There is no legal remedy, except to the mortgagor and his personal representative; but in Equity the question is, who is entitled to the estate? Now if there be no claim upon it, by the representative of the administrator, in respect of disbursements by the administrator for the

benefit of the estate, the administrator *de bonis non* is clearly entitled to it, and a reconveyance of it to him ought to be decreed. The mortgagee is to be considered a trustee for him. If there were a reconveyance to the representative of the administrator, he would be a trustee for the administrator *de bonis non*. Therefore, when it is clear to the Court that the representative of the administrator has no claim on the estate, and that the administrator *de bonis non* is the person to whom a reconveyance must ultimately be executed, there seems no reason why he should not be allowed to file a bill against the mortgagee to redeem. Here the representative of the administrator is a party before the Court, and, if the mortgaged estates may be redeemed, it appears that the representative of the administrator, as such, has no claim upon them. I conceive, therefore, that his right to redeem cannot be set up as a bar to this suit by the administrator *de bonis non*. *Butler v. Bernard* (e) is cited as an authority expressly in point in support of the objection; but on examining the different reports of that case, which are all very meagre, I think Lord *Nottingham* must be understood as having allowed the demurrer, without laying down the doctrine imputed to him. There it did not appear that the representative of the administrator might not have a claim on the estate equal to the value of the equity of redemption; he was no party before the Court, and the report in *Freeman* says the Court decreed the benefit of redemption to the executor of the first administrator, who had aliened the whole estate in law of the term, and was not possessed in *auter droit* of any part of the interest thereof, but in his own right; so that it

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(e) *Freeman's Ch. Cas.* 139; 1 *Ch. Cas.* 224; and see note, 3 *Y. & C.* 33.

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seems to have been taken that the executor of the administrator, when a reconveyance was executed to him, would not be accountable to the administrator *de bonis non*. But whether such executor must convey to the administrator *de bonis non*, I do not find that Lord *Nottingham* intimates any opinion that a bill to redeem may not be maintained by the administrator *de bonis non*, against the mortgagee.

However, on the ground that the plaintiff has not shown any acknowledgment, within 20 years before filing the bill, that the estates were held subject to a mortgage, I think that the decree ought to be supported. For this point the plaintiff relies on the deeds of the 22d and 23d of *June* 1818, containing a recital of the deeds of 31st of *January* 1805, and the 18th and 19th of *January* 1815. But I am of opinion that this recital is no sufficient acknowledgment; for a charge might subsist in 1805 and 1815, which did not subsist in 1818, and there is nothing in the latest deed, beyond the recital, to show a subsisting charge.

I likewise think that, from the long acquiescence of the parties, there is reasonable ground to infer that the contemplated releases were executed; so that the next of kin of *T. Hubbert* renounced all interest in his personal estate for the benefit of his creditors, and whether the releases were executed or not is now immaterial. On the merits, therefore, in my opinion the bill was properly dismissed, with costs.

[It was accordingly ordered and adjudged that the appeal be dismissed, and that the decree therein complained of be affirmed; and that the Appellant should pay the Respondents *Davis* and Co., and *Far- rand* and *Thompson*, the costs incurred by them in respect of the appeal.]

The Rev. JOHN FERGUSON, Minister
of *Monivaird*, and Others - - } *Appellants.*

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July 7, 8. 11.
August 9.

The Right Honourable THOMAS ROBERT
EARL OF KINNOULL, and the
Rev. ROBERT YOUNG, Preacher of
the Gospel, Presentee to the Church
and Parish of *Auchterarder* - - } *Respondents.*

IF the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable, jointly and severally, for the failure and refusal.

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Pleading.*

Persons having judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts.

In such action no allegation of malice is necessary.

The taking on his trials a presentee to a church in *Scotland*, is a ministerial act which the Presbytery is bound to perform, and for the neglect or refusal to perform which every member of the Presbytery is liable to make compensation in damages to the party injured. And he may maintain such action against the members collectively and individually.

ON the 21st of *December* 1839, the Respondents instituted a suit against the Appellants, for reparation and damages. The summons stated that the church and parish of *Auchterarder* having become vacant by the death of the Rev. *Charles Stewart*, on the 31st of *August* 1834, the Earl of *Kinnoull*, in *September* 1834, issued a deed of presentation, in favour of the Rev. *Robert Young*, nominating and presenting him to be minister of the said church and parish, and giving, granting, &c. the stipend and other profits belonging to the said church; requiring thereby the Moderator and the Presbytery of *Auchterarder* to take trial of the qualifications, &c. of the said *Robert Young*; and after

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having found him qualified, to admit and receive him, and give him his act of ordination: That at a meeting of Presbytery, on the 14th *October* 1834, the aforesaid deed of presentation, together with a certificate of the patron's having qualified to Government, the presentee's letter of acceptance of said presentation, certificate of his having qualified to Government, parochial certificate, and a certificate signed by five ministers of *Dundee*, that the presentee was a licentiate of the Presbytery of *Dundee*, with an engagement to produce an extract of his license so soon as a meeting of the Presbytery of *Dundee* should be held, were all given in and read, and appointed to lie on the table of the Presbytery until the next meeting: That at the next meeting of the Presbytery, on the 27th *October* 1834, there was produced an extract of the license of the pursuer, the Rev. *Robert Young*, as a preacher of the Gospel, and a testimonial in his favour by the Presbytery of *Dundee*: That the minutes of the Presbytery of *Auchterarder* declared that all the documents usually given in, in cases of this kind, having already been laid on the table, the Presbytery did so far sustain the presentation as to appoint a day for moderating in a call to Mr. *Young* to be minister of that church and parish: That after certain procedure, the Presbytery, on 7th *July* 1835, did, on the sole ground that a majority of the male heads of families, communicants in the parish of *Auchterarder*, had dissented, without any reason assigned, from his admission as minister, refuse to make trial of his qualifications, and did then reject him as presentee so far as regarded the particular presentation in his favour, and the occasion of the vacancy in the parish; and intimation of the determination was directed to be forthwith given to the patron and presentee, which was done accordingly: That the pur-

suers, as patron and presentee respectively, thereupon instituted a process against the members of the Presbytery of *Auchterarder*, collectively and individually, to have the rights of the patron and presentee declared by the Court of Session. The summons then recited the decree of the Court, pronounced in *March* 1838, whereby it was declared that "the Earl of *Kinnoull* has legally, validly, and effectually exercised his right as patron of the church and parish of *Auchterarder*, by presenting *Robert Young* to the said church and parish: That the defenders, the Presbytery of *Auchterarder*, did refuse, and continue to refuse, to take trial of the qualifications of the said *Robert Young*, and have rejected him as presentee to the said church and parish, on the sole ground (as they admit on the record) that a majority of the male heads of families, communicants in the said parish, have dissented, without any reason assigned, from his admission as minister: Find, that the said Presbytery in so doing have acted to the hurt and prejudice of the said pursuers, illegally, and in violation of their duty, and contrary to the provisions of certain statutes libelled on; and in particular, contrary to the provisions of the statute of 10th *Anne*, cap. 12." That on the 3d of *April* 1838, a memorial was presented to the Presbytery by the pursuers, as patron and presentee, setting forth the above decree, and requiring the members of Presbytery "to repair so far the injury decreed to have been done, by taking *Robert Young* on trials, and thereafter proceeding in his settlement as minister of the said church, without any farther delay;" nevertheless they refused to make trial of his qualifications, and to proceed in his settlement as aforesaid; and therefore the pursuers, for their respective interests as patron

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and presentee, protested that the Presbytery, and the individual members thereof, should be, conjunctly and severally, liable for all loss occasioned to the pursuers, or either of them, through such refusal or delay. The summons then stated that the Presbytery had referred the matter to the General Assembly, by the members of which the conduct of the Presbytery had been approved; and an appeal was directed to be presented to the House of Lords, against the decree of the Court of Session: That such appeal was presented, and the decree was confirmed (a): That a fresh order of the Court of Session, in conformity with the decision of the House of Lords, was issued and duly served on the Presbytery, but that the members thereof still refused to take *Robert Young* on his trials; whereupon the pursuers caused a notarial protest to be served upon the Presbytery, and upon each individual member thereof, intimating that they and each of them ought to be held liable to the pursuers for all the loss, &c. sustained through the illegal refusal of the said Presbytery, and individual members thereof, to implement and give full effect to the judgments of our said Lords, and of the House of Lords, by taking trial of the qualifications of *Robert Young*, and admitting and receiving him minister of *Auchterarder* as aforesaid. The summons then alleged a specific act of refusal, on the 2d of *July* 1839, by a majority of the Presbytery resolving to refer the above documents *simpliciter* to the General Assembly; it described the loss thereby inflicted on the pursuers, and prayed that the persons who composed the majority at the meeting where such refusal was made, should be decerned and ordained, conjunctly and

(a) *Ante*, Vol. VI. p. 646.

severally, to make payment to the pursuers respectively, of damages, in reparation of the wrong done to, and injury and damage sustained by them, in respect of the illegal refusal of the defenders to take trial of the qualifications of *Robert Young*.

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The defenders (the present Appellants) put in several pleas, alleging in substance,—

That the conclusions of the libel are directed against the defenders solely as individuals, in consideration of acts alleged to have been done by the Presbytery of *Auchterarder* in its official and corporate capacity; and as the defenders as individuals could not competently have taken the pursuer Mr. *Young* on trial, they cannot be made individually responsible for the alleged refusal of the Presbytery to do so, unless it were libelled that they acted maliciously.

That it is altogether incompetent to pursue the individual defenders for acts done in a lawful Court by the Presbytery itself, on the allegation that they constituted the majority present at a particular meeting, especially as the Presbytery and its members are not parties to this action, either individually or as a body.

That even if this action had been directed against the Presbytery in its corporate capacity, its individual members cannot be rendered responsible in damages for acts done by them as a Court, concerning the subject-matter of their jurisdiction, and under the direction of the superior ecclesiastical judicatory of this country, unless malice be averred.

That there was no order on the Presbytery to take the pursuer Mr. *Young* on trials on the 2d of *July* 1839, nor indeed was an order upon it ever pronounced to any effect whatever. The members were

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therefore fully entitled to refer the matter to the superior Church Court, at their meeting of the 2d of *July* 1839. Nor did they, in doing so, refuse to obey any order of the Court of Session or of the House of Lords. As this is the sole ground of damage libelled against the defenders as forming the alleged majority of the said meeting, the action ought to be dismissed.

That by the constitution of the Church of *Scotland*, and the statutes relative thereto, it is not competent for any patron or presentee to sue a Church Court, or its individual members, for damages on the grounds libelled in this action, nor have the pursuers any sufficient title to pursue the same.

That the pursuers are not entitled to damages from the defenders; for that,

The Earl of *Kinnoull*, as patron of the church and parish of *Auchterarder*, in the event of the Presbytery refusing to receive his presentee, is only entitled to retain the vacant stipend under the Act 1592, c. 17.

That the Presbytery is by law the only competent Court by which the right of a presentee to the fruits of the benefice can be completed by ordination; and unless the pursuer Mr. *Young* can establish that he would have been ordained by the Presbytery, or could have compelled ordination, he can prove no damage in this matter.

That the pursuer Mr. *Young* is barred *personali exceptione* from challenging the acts of his ecclesiastical superiors in a civil Court.

The pursuers answered:

That it is *res judicata* that the Presbytery of *Auchterarder*, and the individual members thereof, by refusing to take trial of the qualifications of the pursuer the Rev. *Robert Young*, as presentee to the church and

parish of *Auchterarder*, and by rejecting him exclusively in respect of the *veto* of a majority of male heads of families, acted to the hurt and prejudice of the pursuers, illegally, in violation of their duty, and contrary to the provisions of certain statutes, and in particular of the statute 10th *Anne*, c. 12.

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That in consequence of their refusal to give obedience to the judgments of the Court of Session and of the House of Lords when duly called upon to do so, they became liable in damages in terms of the conclusions of the libel.

The Lord Ordinary *Cuninghame* having reported the cause to the First Division of the Court, their Lordships pronounced the following interlocutor:—

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“The Lords, on the report of Lord *Cuninghame*, having advised this case, and heard counsel for the defenders, Find the action, as laid in the summons, is relevant at the instance of both the pursuers, and repel the objections to the relevancy thereof, and to the jurisdiction of the Court to entertain and give effect to the same, as stated in the pleas in law for the defenders in the revised answers to the revised condescendence: Find, that after the judgments libelled on, it was not within the competency of the Presbytery, as a Presbytery of the Church, to refuse or decline to take the presentee on trials; and after the judgments libelled on, the Presbytery was not entitled to refuse to take the presentee on trials: Find, that the acts founded on in the summons, do form grounds of damage in law: Find, that it is not necessary to aver malice in this case; repel the plea of personal exception pleaded against the pursuer Mr. *Young*, and decern.”

This was the interlocutor now appealed against.

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The *Attorney-general*, for the Appellants:—This judgment is a perfect novelty in the law of *Scotland*, and it is submitted that there can be no private action against an individual in respect of any public duties which he has to perform as a member of a Court. If so, the judgment of the Court below must be reversed. The Presbytery here is a Court; it has a right to tax the people for some purposes, and it has rights with reference to the ordination of ministers. In all the Acts of Parliament it is so spoken of (*b*). It is never described by text writers but as the Kirk, and the kirk is a corporation (*c*). Such a body may be responsible to the public justice of the country for doing what the law forbids, or not doing what the law requires, but cannot be responsible to an individual. But if no action will lie against the body, still more clear is it that no action will lie against any individual member of it. The individual may be punished for misfeasance in a criminal proceeding against the whole Court of which he is a member, but he cannot be liable to a private action on that account. At all events, clear, if not express malice is required to make him liable, *Orr v. Currie* (*d*). There is not the least averment of malice here. Of all actions too, this particular one is the least fit to be sustained. It is an action for damages founded on an alleged irregularity in a judicial proceeding; and it is the same in all respects as an action in this country would be, if directed against the private party to a previous suit, the agent in the suit, the Judge and the officer of the Court. Such an action cannot be

(*b*) See the Acts collected in Robertson's report of the *Auchterarder* case before the Court of Session, vol. 2, Appendix.

(*c*) *Bankt. Inst. of the Law of Scotland*, p. 51, tit. 2, b. 1; *Ersk.* I. 5. 24.

(*d*) 18 Fac. Coll. 625.

maintainable. Here too it is bad in another respect; for supposing that some action would lie, it is clear that no action of this sort can be brought against a corporation and its members. No action will lie against any member of a corporation for votes given in it; Dr. *Groenvelt's* case (*e*), where Lord *Holt* expressly laid it down that Judges were not liable in actions or indictments for false judgments given. That principle was adopted in *Picton's* case (*f*); and it was applied in *Bassett v. Godschall* (*g*) to justices, who were held not liable to an action for refusing to license an alehouse; *Lowther v. Radnor* (*h*) is to the same effect. In *Harman v. Tappenden* (*i*), the Court of King's Bench held that an action does not lie against individuals for acts erroneously done by them in a corporate capacity, from which detriment happens to the plaintiff, without proof of malice; and in a note to that case is reported the case of *Drewe v. Coulton* (*k*), where the same was laid down with respect to a returning officer of a Parliamentary borough. *Beaurain v. Sir W. Scott* (*l*) will be cited on the other side. There it was held that an action on the case could be maintained against a Judge of the Ecclesiastical Court. But that was where the Judge excommunicated a party for refusing to obey an order which the Court had no authority to make, and which was irregular and void, even according to the practice of that Court itself. The Judge therefore was not held liable as Judge; for what he had done was not within his jurisdiction. And within that limit, the effect of the case of *Beaurain v. Scott* is confined by the sub-

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| (<i>e</i>) Ld. Raym. 454-468; Comb. 76; 1 Salk. 144; Carth. 491. | (<i>h</i>) 8 East, 113. |
| (<i>f</i>) 30 State Trials, 449. 805. 883. | (<i>i</i>) 1 East, 555. |
| (<i>g</i>) 3 Wils. 121. | (<i>k</i>) Id. 563 n. |
| | (<i>l</i>) 3 Camp. 388. |

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sequent case of *Ackerley v. Parkinson* (m), where the proceedings were likewise irregular and void, but where the defendant had, as vicar-general to the Bishop of *Chester*, jurisdiction in the matter, and was therefore protected.

[The *Lord Chancellor* : I think we may take that principle for granted, that where a party has jurisdiction to do an act, no action will lie against him for doing it, unless malice is shown.—*Lord Campbell* : The difficulty here is not to show, as one of the defenders' pleas alleges, that the party might have been rejected after trial, but can you make out that the Presbytery had discretion to take the presentee on trial or not?]

The same sort of proceeding ought to be adopted here as in cases where the quarter sessions refuse to hear an appeal. No one will maintain that, if the sessions improperly refuse to hear an appeal, the party grieved, instead of applying for a mandamus, may maintain an action against the individual members. It is doubtful whether an action would lie even on proof of malice ; it is certain that the action will not lie without such proof. Suppose this House had remitted the case to the Court of Session with instructions, and that Court had said that the House was wrong, and had disobeyed the instructions, would the present Respondents have had a right to maintain an action against the individual members of the Court ? Certainly not. The punishment for the disobedience would have been of a very different kind. In *Doswell v. Impey* (n), commissioners of bankrupt were held not liable to an action of trespass for committing a person whose answers had not been satisfactory to the commissioners. Now suppose the party committed had obtained from another Court his liberation, and then

(m) 3 Maule & S. 411.

(n) 1 Barn. & Cres. 163.

the commissioners had sent for the man again and put the same questions, and receiving the same answers had again committed him, they would not have been liable to an action at his suit. Such conduct on their part might have rendered them liable to be instantly degraded from their office as commissioners, but would not have rendered them liable to an action. In *Tinsley v. Nassau* (o), this privilege from liability to action was extended to sheriffs; and it was held that trespass would not lie against a sheriff, for the act of his bailiff in taking the goods of A. under a warrant from the sheriff against the goods of B. in execution of the judgment of the County Court, on the ground that the sheriff was a constituent part of that Court. In *Garnett v. Ferrand* (p), a coroner was held not liable in trespass for having turned a person out of his Court. *Fawcett v. Fowlis* (q), *Mills v. Collett* (r), and *Ashcroft v. Bourne* (s), are all cases in which the same principle is recognised. Try the matter again by the rules applicable to cases of mandamus. Generally speaking, a mandamus will not be granted where there is another remedy; as for instance, an action. That shows the Courts to act on the distinction already stated. But suppose the mandamus to be issued and to be disobeyed, the public body disobeying it will not be liable to an action on the case for the injury inflicted by such disobedience to the writ upon the person at whose desire it was issued. And obedience to a peremptory mandamus is not secured by an action.

[The *Lord Chancellor*: Suppose a man is ordered by Act of Parliament to do a certain thing, he may be compelled by mandamus and attachment

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(o) 1 Moo. & Mal. 52.

(p) 6 Barn. & Cres. 611.

(q) 7 Barn. & Cres. 394.

(r) 3 Moore & Payne, 242.

(s) 3 Barn. & Ad. 684.

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to do it, but he may also be indicted for not doing it. Then, why may not an individual injured by his non-feasance bring an action, if the act ordered to be done is a ministerial act ?]—If the act is merely ministerial, the action would probably lie. If the act is not merely ministerial, no such action would lie. No such action has ever been thought of against a magistrate for his vote at the quarter sessions, in refusing to hear an appeal, or refusing to enforce a penalty. There is even a total absence of actions in cases where members of a Court, not of record, such for instance as a Small-debt Court, have given votes on questions coming before them. Now this is an action against Mr. *Ferguson* for voting in a matter lawfully referred to the decision of the body of which he was a member. His vote was on a matter judicially to be decided on. The circumstance of putting the question to the vote shows that it was not purely a ministerial act. If it had been so, why could not the minority have done the act? On this part of the argument it is clearly established that the Presbytery is a Court. If so, there cannot be any action against it, nor against any member of it, for its judicial decisions. It is shown by authorities on one side, and by the total absence of authorities on the other, first, that judicial acts of any sort are not the subject of private actions ; secondly, that where the act complained of is the act of a body corporate, a Court for instance, no action can be maintained against the members of the corporation who dissent from the others, whether that dissent does or does not prevail ; and at all events no action can be maintained in the case of individuals whose public duties are of a ministerial character ; if what is done is done in that character, though erroneous, it is not actionable.

Then as to the form of these proceedings. The judgment of this House was not directed against the individual members of the Presbytery. There was no judgment assoilzing them, nor declaring them liable.—[The *Lord Chancellor*: The judgment was, that their refusal to take the presentee on his trials was illegal; they have refused again.—Lord *Brougham*: But the Attorney-general means to say that they referred to another body for their directions.—The *Lord Chancellor*: But when the law says that persons are bound to do a certain thing, they are not entitled to avoid doing it, by referring the party who requires the performance of the act to another body. If they refuse to do it, they subject themselves to an action. Every refusal or neglect of what a party is bound by the law to perform, if it works a wrong to another, is the subject of an action. If a magistrate refuses to take an examination after a robbery committed, he is liable.]—But that is a ministerial act.—[The *Lord Chancellor*: And the Presbytery acts ministerially in taking or refusing a man on his trials.—Lord *Cottenham*: To enter on his trials is a ministerial act; the Presbytery afterwards exercises a judicial power in determining whether, upon his trial, he has proved himself fit for the ministry.]—The objection seems to take this shape, that the persons composing the Presbytery are ministerial officers for the purpose of meeting together, and judicial from the moment of doing so. Can this distinction be maintained? Suppose a Judge to direct a case to be struck out of his paper, or to refuse to allow it to be entered there, is that a judicial act? If not, he would be liable to an action. Yet it never has been supposed that he would be so liable. But if the rule of liability is adopted as to the Presbytery, it must

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be true of every other body, and be applicable to all similar cases; and where ministerial functions end, and judicial functions begin, will then be the question of difficulty to be decided in all cases whatever. Suppose the members of the Presbytery had simply refused to meet. They would not have been liable to an action for that refusal. Then how would the distinction of ministerial and judicial apply in that instance?—[Lord *Brougham*: Your argument now, if good for anything, would destroy your former argument. You seemed before to concede that an attachment or an indictment would lie, yet you now argue as if no process whatever would lie against these persons.]—A public proceeding might be had against them, but no indictment could be maintained. The broad proposition, however, is that where any part of a transaction is of a judicial character, that character affects the whole of it.—[Lord *Campbell*: Suppose there was a peremptory mandamus to a Bishop to license a vicar, and the Bishop merely refused, without saying that he had examined the presentee and found him unfit, would not an action lie against the Bishop?]—That would be a mere ministerial act. But where the right of judging and deciding existed, as it does here, no action would lie. Finally, it is clear that there is no cause of action here; for as to the patron, he retains the temporalities of the living till after the induction of the incumbent, and the presentee can have no vested right to them till actual admission. The *damnum* here is, therefore, as to both these parties, a *damnum absque injuria*, and consequently cannot form the subject of compensation in damages.

Mr. *Pemberton*, on the same side:—It is no part of the duty of the counsel for these Appellants, to im-

peach in the slightest degree the soundness or the binding obligation of the judgment that has been already pronounced, or to defend any disobedience to it. That judgment must be admitted to be entirely binding; and the only question now to be discussed is, whether this action has been properly conceived, and whether it is sustainable in point of law against these Appellants: some of the persons who were parties to the former case, not being parties to the present. Leaving the question, whether the duties cast on the Presbytery are of a ministerial or judicial nature, where the argument already heard has placed it, the point now to be contended for is that no action will lie against the individual members of a body which was not directed by this House to do an act, but was simply stated to be liable by law to perform that act.—[Lord *Brougham*: Is not that the ordinary form of command, when directed to those who are declared to be bound and adstricted to do a certain act?]
—The decree adopts the terms of the libel, and cannot go beyond them. Here there were no petitory conclusions to the libel; and there must therefore, be a new action to enforce the declaratory conclusions. Then comes the question as to the rights and duties of this corporate body, the Presbytery. The patron has a right to the stipend of this vacant benefice. If the Presbytery should in *Scotland* refuse to admit him, the remedy would be by appeal to the Synod, and thence to the General Assembly, whose sentence is final(*t*). Letters of horning might in certain cases issue against the Presbyteries as against a society or body of men, but they would be for debts and not for matters of this kind(*u*). There is no instance whatever in

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(*t*) *Ersk. Inst. bk. i. tit. 5, s. 16.* (*u*) *Id. bk. iv. tit. 3, s. 11.*

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which the remedy now sought to be enforced has been put in force on a claim like the present. Where the patron's rights are invaded, a specific remedy is by the law of *Scotland*, as by that of *England*, provided for him. There is no authority to show that an individual of a body is liable in an action for the act of the majority of that body, the act being that of a corporation, and not of the individual.—[Lord *Campbell*: That argument would affect the proceeding by letters of horning; the minority being willing to obey, would not be liable.]—The minority would be liable, if the whole body was civilly answerable.

What has been done here is not the subject of action; but if an action will lie, it must be against the corporate body alone, for no individual of that body could do the act the omission to do which is the subject of complaint here. The Presbytery here having once pronounced a decision, could not review that decision, but was compelled to send it before the superior Court. To make individual members of the Presbytery liable under such circumstances, will be to introduce for the first time a precedent for which no authority is to be found in the principles or practice of the law of *Scotland*. And it is, besides, perfectly clear that neither of the Respondents has sustained such an injury as to found a claim for compensation in damages.

The *Solicitor-general*, for the Respondents:—It is not necessary for the Respondents to show that the present action rests on the judgment of this House, or of the Court below, given in any previous suit. It is an action against these parties for being guilty of illegally refusing to admit Mr. *Young* to his trials. It is assumed, but without justification, that the Presbytery

is a corporation. It is an assembly of ministers of the Church of *Scotland*, to whom are entrusted the performance of certain public duties. For certain purposes the Presbytery is a Court ; but as far as respects the proceedings in the present action, its duty is simply to take on trial the presentee of a pàtron, and to examine whether he is, so far as respects learning and character, fit to be admitted to the benefice.

[The *Lord Chancellor*: The Presbytery stands in place of the Ordinary. He is considered a corporation.]—The Presbytery may be a corporation for this purpose, but not in the proper sense of the term. According to the statute of 1592, the Presbytery is a body to take the presentee on trials ; it has no discretion whatever to refuse to do so. But if the Presbytery might be supposed to have a discretion before the judgment of this House was pronounced, it has had none since. That judgment did direct the Presbytery to take the presentee on trials. [The learned counsel referred to the form of the libel and of the judgment.] It was absolutely necessary here, according to the forms of the law of *Scotland*, that the individual members of the Presbytery should be made parties to the suit. Then this is said to be an action against the members of a Court ; and it is argued that no action will lie for things done by members of a Court in their judicial character. The answer is that this was not an act with respect to which the Presbytery had any discretion, or which was one of a judicial character. It was an act which, by the language of the law, the Presbytery was bound and adstricted to perform. That language clearly describes a ministerial act. If an individual is injured by the non-performance of such an act, he clearly has a remedy against the persons who were so bound to perform it.

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Then where is the force of any distinction arising from the circumstance that the act ought to be performed by several persons, instead of by one? The wrong of the non-performance cannot be affected by the numbers who commit it, so as to deprive of his lawful remedy the person injured by that wrong. In the cases cited on the other side, the distinction here taken is plainly perceivable.

Justices of the peace have a discretion in some cases; in others they have not. In the latter, as for instance where they are bound to take an examination, if they do not take it they are liable to an action. The Presbytery in *Scotland* cannot stand in a higher or better situation than the Bishops in *England*. If a Bishop should refuse to examine a presentee, an action would lie against him for his refusal. In 2 Institute (*x*) it is said, "If a man be excommunicated and offer to obey and perform the sentence, and the Bishop refuseth to accept it and to assoile him, he shall have a writ to the Bishop requiring him, upon the performing of the sentence, to assoile him, &c.; and the reason thereof is, for that by the excommunication, the party is disabled to sue any action, or to have any remedy for any wrong done unto him, so long as he shall remain excommunicate. And also the party grieved may have his action upon the case against the Bishop, in like manner as he may when the Bishop doth excommunicate him for a matter which belongeth not to the Ecclesiastical conusance. Also, the Bishop in those cases may be indicted at the suit of the King." And in Doctor and Student (*y*), it is said, "that if the excommunication be of record, and the Judge Ecclesiastical will not assoile the party when he ought

(*x*) 623.

(*y*) Dial. 2, c. 32.

to do so, the King may write to the Judge Spiritual commanding him to grant letters of absolution upon pain of contempt; and if the said excommunication be not of record in the King's Court, then the party may in such case have his action against the Judge Spiritual, for that he would not make him his letters of absolution." Here therefore is the case of an action against a Judge for what at least largely partakes of judicial functions. All the authorities upon this point will be found collected in the case of *Ackerley v. Parkinson* (a).

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[Lord *Brougham*: It does not appear that in *quare impedit*, before the statute of *Westminster* 2, any action could be maintained at common law against the Bishop in respect of the revenue of the living; but since then the value of the church and the length of time during which it has been vacant, have always been given in evidence with a view to damages.—The Lord Chancellor: Perhaps damages were not given at common law, because they were deemed to savour of simony.—Lord *Brougham*: In all probability that is the right explanation.]

It is however doubtful whether damages were not given at common law; for it appears by *Blackstone* (b), that after order to admit in *quare impedit*, if the Bishop did not admit, the party might have a writ *quare non admisit*, and obtain ample compensation thereon; and that was clearly a common-law writ. *Comyn* (c) is to the same effect. The case of *Beaurain v. Scott* (d) was for an excess of jurisdiction, but there the Judge himself was held clearly liable. The power to proceed criminally does not exclude the right to proceed civilly. The last sen-

(a) 3 Maule & Selw. 411.

(c) Courts B. 15.

(b) 3 Comm. 249, 250.

(d) 3 Camp. 388.

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tence of the quotation already made from Lord *Coke* (*e*) shows that to be so. A man may be indicted for non-repair of a bridge. He may also have an action brought against him for a private injury occasioned thereby. This case does not resemble that of a Judge in a case where he has jurisdiction, and acts according to the best of his discretion. The case of the alehouse license, *Bassett v. Godschall* (*f*), does not apply to the present; for there the plaintiff had no antecedent right to a license, from the enjoyment of which he was excluded by the act of the magistrates. But where he has an existing right, which the co-operation of the magistrate can alone enable him to enforce, if that co-operation is refused, he may maintain an action to recover damages for the injury he thereby sustains. Thus in the case of *Green v. Bucklechurches* (*g*), where the party was entitled to claim damages against the hundred after giving information on the statute of Hue and Cry, and the magistrate refused to take such information, it was held that he might maintain an action against the magistrate for such refusal, by which he was prevented from enforcing his claim against the hundred. That case is exactly in point with the present. Here the party has a right, from the exercise of which he has been unduly prevented by the act of the Appellants. In the cases of commissioners of bankrupts, coroners and magistrates, there are certain circumstances where, when those persons are acting judicially, no action will lie against them for what they do. But there are other circumstances in which they are only acting ministerially, and then no doubt can be entertained that an action may be maintained against them. The law of *Scotland* is the same as that of *England* on this point,

(*e*) 2 Inst. 623.
 (*f*) 3 Wils. 121.

(*g*) 1 Leon. p. 323, c. 456.

Innes v. The Magistrates of Edinburgh (h). *Orr v. Currie* (i) is not an authority the other way ; for the sheriff was there discharged from the action, not because he was not liable to have an action against him in point of law, but because the facts there justified him in what he had done. Lord *Fullerton*, who in the former case had been of opinion against the plaintiff, expressed himself in this case clearly in favour of this action, as soon as it was decided by this House that the Presbytery was bound to take the presentee on trials. Where a man has a duty to perform and he neglects to perform it, an action will lie without showing malice. It is only where he has a right to exercise, and he exercises it wrongfully, that proof of malice is required in order to enable a party injured to sustain an action.

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Then as to the objection that this action is wrong in point of form, in consequence of being brought against these particular defendants. It is clear from the constant practice in the cases of commissions of bankrupt, that if three commissioners vote for something which wrongfully occasions an injury to an individual, he may maintain an action against all of them. The same rule applies, whether the injury arises from a nonfeasance or a misfeasance. If it is the duty of five persons to perform a certain act, it is the duty of each of those five to perform the act, or to concur in the performance of it. If it should be necessary for all five to perform the act, and four of them are willing to do it, but the fifth refuses, the party does not sustain an injury from the four, but he does sustain it from the one, and against that one he may bring his action ; the wrong arising from the act of an individual who prevents a body from acting. If it was not so, the injured party would be entirely

(A) *Morr.* 13189.

(i) 18 *Fac. Col.* 625.

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without a remedy. The answer to this action, that these persons constituted a corporation, cannot be set up here. They do not constitute a corporation; they have no seal, nor funds, nor property. They are a mere assembly of persons having settled duties to perform; and for the nonperformance of those duties all of them are liable.—[Lord *Cottenham* referred to *Duncan v. Findlater* (j).] The fact that the duties are required to be performed by several persons, will not constitute those persons a corporation. There are many cases where, by the law of this country, several persons must act together in doing a certain thing; if a mandamus issues to them to do it, and they neglect, all who are guilty of the neglect are personally responsible.—[Lord *Campbell*: Suppose a mandamus directed a meeting to be held for the election of corporate officers, would those who stayed away be liable to an attachment?—They would if, by so staying away, they prevented the doing of the act which the mandamus had ordered. In *The King v. Ripon* (k), Lord *Holt* held that an action would lie against particular persons who caused a false return to be made to a mandamus, in the name of a corporation; and the case of *Canterbury* (l) was mentioned. In *Rich v. Pilkington* (m), which was an action against the Mayor of *London* for a false return to a mandamus directed to the Mayor and Corporation, an objection was taken to the form of the action, but it was held that, being in *tort*, it might be joint or several, at the election of the party; it was then objected, that the mandamus being directed to all, it might be injurious to the defendant, for he might have voted against the return complained of, and been overruled by the majority; but the Court decided against the objection,

(j) *Ante*, Vol. VI. p. 894.

(k) 1 *Ld. Raym.* 564; *Salk.* 433.

(l) 1 *Lev.* 119.

(m) *Carth.* 171.

saying that if the Mayor was overruled, that would be evidence for him on a plea of not guilty. But there are cases where an action for a wrong done may be maintained by an individual against a corporation; *Henley v. The Mayor and Burgesses of Lyme Regis* (n). *Harman v. Tappenden* (o) is not an authority for the Appellants; for the judgment of Mr. Justice Lawrence (p) shows that the defendants there were excused because, in doing a thing which they had a right to do, they had merely been guilty of an error of judgment. Here the act was not a mere error of judgment, but was a tortious act, and the party injured by it may have his action for the tort.

Then it is said on the other side, that if these parties are liable, they are liable to a public proceeding against them, but are not liable in an action for damages. It is no principle, either of the *Scotch* or *English* law, that a wrongdoer, though liable to a public proceeding, is not liable in an action for damages. It is asked who are to pay the damages? They are to be paid by the individual members of the Presbytery, against whom the action is brought. There have been two cases of actions against Presbyteries, and in each the individual members of the Presbytery were treated as distinct persons, and were allowed to enter upon separate defences; *Clark v. Henderson* (q), and *Edwards v. Cruickshank* (r). This is a peculiarity of the law of *Scotland*.—[The Lord Chancellor: So that, by the law of *Scotland*, suing the Presbytery is in fact suing the individual members who compose the Presbytery.]—It is so. The same course was recognised in this House as correct in *Gray v. Forbes* (s), where each

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(n) 3 Barn. & Ad. 77; 5 Bing. 91; *Ante*, Vol. II. p. 331.

(o) 1 East, 555.

(p) *Id.* 562.

(q) 1 Dunl. B. & M. 955.

(r) 3 Dunl. B. & M. 282.

(s) *Ante*, Vol. V. p. 356.

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individual member of the corporation of *Glasgow* was held to be affected with responsibility in an action for a wrong committed by the body.

On the whole, it is clear that there is no ground for reversing the unanimous judgment of the Court below. This is an attempt, on the part of the Appellants, to evade, if they cannot resist, the former judgment of this House. The principles of the law of *England* and of *Scotland* are the same on this point; and neither of them will allow persons to neglect a positive duty, and so to inflict injury on an individual, without holding them liable to make him compensation.

Mr. *Wortley*, on the same side :—The first question here is, whether the injury inflicted by the Appellants on the Respondents is such as to give a right of action; and the next, whether there is anything in the circumstances of the case, or of the Respondents' situation, to exempt them from the liability which they would otherwise have incurred. As to the first question, the right to maintain an action where there has been, as there has here, a positive and wilful disobedience to the provisions of a statute, is thus distinctly shown in a report of this House, in the case of *Ashby v. White* (t): "When any statute requires an act to be done for the benefit of another, or to forbear the doing of an act which may be to his injury, though no action be given in express terms by the statute for the omission or commission, the general rule of law in all such cases is, that the party injured shall have an action;" and reference is there made to Lord *Coke's Reports*, and to his *Institutes*, and to *Magna Charta*, in support of this maxim; which, it is added, "is one allowed and approved of in all ages." Unless this action is maintainable, neither patron nor pre-

santee can have any effectual remedy; a consideration which, if no authorities existed in favour of the proceeding, would be sufficient to establish its validity, as the law will not allow the violation of a legal right without giving to the party injured thereby a legal remedy.

Fitzherbert (*u*) is to the same effect as the Institutes (*x*), as to the duties of the Bishop; and there can be no doubt that the Presbytery in the *Scotch* Church stands in the same position as the Bishop does in the Church of *England*, and has the same duties and liabilities. There is a strong analogy in favour of this action afforded by the trials of a person appointed in *Scotland* to be a Judge (*y*). The Judges are directed to put him on his trials; the Judges are bound to do so, and under the old law there can be no doubt that he could have sued them for a refusal to do so. They must now admit him; and if they have strong objections to him, they can only remonstrate to the Crown.—[Lord *Campbell*: Would the person so rejected have a right of action against the Judges, if they refused to examine him?] He would. *Erskine's* Institutes (*z*), and *Aldam's* case. In like manner an action will lie in *Scotland* against a person for refusing to issue a writ, which it is his duty to issue on the demand of the subject; *Laing v. Morrison* (*a*), *Strahan v. Stodart* (*b*), and *Bell's Commentaries* (*c*). A similar rule was applied here in *Green v. Bucklechurches* (*d*), where the justices had refused to take an examination under the statutes of Hue and Cry.

Malice need not be alleged in this action, because

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| (<i>u</i>) 145, Writ de Ex cap. | (<i>a</i>) Morr. 8855. |
| (<i>x</i>) 2 Inst. 623. | (<i>b</i>) 4 Fac. Dec. 5. |
| (<i>y</i>) Ersk. Instit. bk. i. tit. 3, | (<i>c</i>) Vol. 2, p. 566, 567. |
| s. 15, p. 57. | (<i>d</i>) 1 Leon. 323, c. 456. |
| (<i>z</i>) Bk. i. tit. 2, s. 32, p. 49. | |

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here the Appellants had no discretion to grant or refuse what was required. An action would lie against a Judge for unlawfully refusing to issue a writ of *habeas corpus*, or to swear a man into an office; and as it is his duty to do these things on lawful requirement, his refusal, without any proof of malice, would subject him to the action.

The *Attorney-general*, in reply:—It is not intended to say one word to impeach the judgment of this House in the former case. The question here is whether the present action is maintainable. The case of a Judge's refusal to issue a writ of *habeas corpus* is not in point here; for the statute provides a distinct penalty of 500*l.*, or treble damages, on his refusal to do what the Act requires. It is a mistake to suppose that there is no wrong without a legal remedy. Take the case of a petition to the Crown to establish a peerage. If, on the Crown referring the question to this House, a Committee for Privileges was ordered to assemble, and in consequence of the absence of Peers the Committee could not be held, the claimant would be put to great expense, and by the death of witnesses his peerage might be lost, yet he would have no remedy against the Peers whose absence had occasioned this delay. In like manner, it is the duty of a Judge to try cases; but if he did not hold his Court to try them, there might be a complaint in Parliament against him, but there could not be any action against him. The case in *Levinz* (e) is good for no purpose whatever; and the case of *Henley v. The Mayor of Lyme Regis* (f) is also inapplicable; for that was an action, not against the members of a corporation who had refused to do an act, but against a

(e) The *Canterbury* case, 1 Lev. 119. (f) *Ante*, Vol. II. p. 331.

corporation, which in its corporate capacity had bound itself to repair walls, and had neglected to perform the duty thus undertaken. *Ashby v. White* (g) was a case of mere ministerial duty, and affords therefore no analogy here. The same observation may be applied to many other cases, particularly to those against the justices for refusing to examine a man when a robbery had been committed. And no doubt, in those cases where a person has *prima facie* a jurisdiction, but exceeds it, he is liable in an action for the excess.

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Then as to the question of this body being a corporation. The Presbytery clearly comes within that description. In *Scotland*, the having a seal is not necessary to constitute a corporation. If the Presbytery is a corporation, then it is clear that this action is not maintainable. No action will lie against a corporation for refusing to admit a man to a seat in the town council, nor for refusing to meet when such meeting is necessary for the purpose of doing some public act. The only proper mode of compelling performance of a duty which has a judicial aspect, is to proceed by mandamus. It is clear that a mandamus would have lain here; and that being the case, the party cannot at the same time be entitled to an action. *Chitty* (h); *R. v. Baker* (i); *R. v. Churchwardens of Weobly* (k); *Clark v. Sarum, Bishop* (l); *R. v. The Governors of the Bank of England* (m); *Powell v. Milbank* (n). If, therefore, any proceeding can be taken against the Presbytery, it is not one of this nature, and the judgment in this case must be reversed.

(g) 14 State Trials, 785. (l) 2 Str. 1082.
(h) General Practice of the Law, part 2, c. 10, p. 787. (m) Doug. 524.
(i) 3 Burr. 1267. (n) Per Ld. Mansfield, 1 Term Rep. 401 n.
(k) 2 Str. 1259.

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THE *Lord Chancellor* :—My Lords, this was a proceeding instituted by the Earl of *Kinnoull* and Mr. *Young* for the purpose of obtaining compensation in damages from the defenders in the Court below, for having refused to take upon trial Mr. *Young* as the presentee of the church of *Auchterarder*. The case came before the Judges of the Court of Session, and they decided in favour of the pursuers by a unanimous decision. From that judgment the defenders have appealed to your Lordships' House.

It was not, I believe, from any real inherent difficulty in the case, but on account of the importance of the subject, that your Lordships took time to consider the judgment.

There is one point which is perfectly clear, and that forms the basis of the whole proceeding. It is perfectly clear that it was the duty of the defenders to take Mr. *Young* on trial of his qualifications as presentee of the church of *Auchterarder*. That question was decided by the Court of Session. It afterwards came before your Lordships' House by appeal, and your Lordships confirmed the decision. The law, therefore, was established by that decision, and it could not afterwards be controverted; it admitted of no further question, no further appeal. Therefore I say it was a point clearly established, that it was the duty of the Presbytery to make trial of Mr. *Young's* qualifications as presentee to the church of *Auchterarder*.

My Lords, the defenders cannot plead ignorance of the law in this case, even if that ignorance would have availed them, because they, or at least some of them, were parties to that suit and that inquiry; nay, more, after the judgment had been affirmed by your Lordships' House, the Lord Ordinary, Lord *Murray*,

pronounced another interlocutor, by which he decreed that the Presbytery, and these defenders by name, were still bound to make trial of the qualifications of Mr. *Young*.

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That interlocutor became final; it was extracted on the 2d of *July*; it was served on the defenders, and at the same time Mr. *Young* presented himself, in order that they might make trial of his qualifications. The question was put to the vote; it was decided against accepting him upon trial by a majority, and by evasion (for I consider it a mere evasion) the matter was referred to the General Assembly. I consider, therefore, the facts established, that it was their duty to take him upon trial, and that they refused to do so. Those are two points, I think, which do not admit of dispute.

Now, my Lords, what is the rule of law as applicable to questions of this kind? When a person has an important public duty to perform, he is bound to perform that duty; and if he neglects or refuses so to do, and an individual in consequence sustains injury, that lays the foundation for an action to recover damages by way of compensation for the injury that he has so sustained.

My Lords, that was expressly laid down,—if it is necessary to cite authority for the purpose,—in the case of *Sutton v. Johnston* (o), by Mr. Baron *Eyre*, in delivering the judgment of the Court of Exchequer in that important case; and other authorities might be mentioned to the same effect.

My Lords, a case was cited at the bar from *Leonard's Reports* (p), of this description:—A party had

(o) 1 Term Rep. 493.

(p) *Green v. Bucklechurches*,
 1 Leon. p. 323, c. 456.

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applied to a justice of the peace to take his examination under the statute of *Elizabeth*, the statute of Hue and Cry; the justice had refused to do this, and the party had in consequence sustained injury, because he was deprived of his right of bringing a suit against the hundred in consequence of that neglect. It was held, upon the principle I have stated, that he was entitled to recover damages against the justice for this neglect of his public duty; he having in consequence sustained a personal injury.

Again, my Lords, there is another case, which is also to the same effect: it is the case of *Stirling v. Turner*, the Lord Mayor of *London*. *Stirling* was a candidate for the office of bridgemaster; the Mayor refused to take a poll, in consequence of which he brought an action against him, and it was held that that action might be sustained to recover damage for the injury. Upon what principle? That it was the duty of the Lord Mayor to take the poll, that he neglected that duty, that the party in consequence sustained injury, and it was therefore held that the action might be maintained.

But, my Lords, this is not the rule in *England* alone; it is a general rule applicable also to *Scotland*. It is as much the law of *Scotland* as the law of *England*. A case was cited at the bar, to which I have no doubt my noble and learned friends have referred, which was the case of *Adam Innes v. The Magistrates of Edinburgh* (q). It was a case of this description:—Some buildings were going on in *Edinburgh*; a pit was dug in one of the lanes, for the purpose of these works; the party fell into the pit, and was hurt, and he brought his action against the magistrates of

Edinburgh, to recover compensation for the injury he had sustained. It was the duty of the magistrates of *Edinburgh* to take every possible precaution for the purpose of preventing accidents of this kind; it was considered that they had neglected that duty,—that they had neglected a public duty, and that the party had in consequence sustained an injury; and the Court decided that he was entitled to recover damages for the injury he had sustained. So that this principle is applicable both to the law of *England* and to the law of *Scotland*; it is a general principle.

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Now, my Lords, what is the argument of the Appellants in this case? It is said that this was the decision of a Court,—the Court of Presbytery; that the members of that Court were acting judicially; and that, acting judicially therefore, if they committed an error, no action can be maintained against them. My Lords, I do not deny that principle as a general principle; and if they had admitted that gentleman to his trial, and after taking him upon trial had come to the conclusion that he was not properly qualified, in that case it would have been a judicial decision, and might not have afforded a ground for supporting an action, although the party should have sustained damage in consequence of it.

But, my Lords, that does not apply to the present case. Here they had no discretion to exercise; they had to form no judgment; they were bound by the law to do the act; they could appeal to no tribunal. It was imperative upon them to accept the party upon his trial; it was their public duty. It bears no analogy, no resemblance, to a judicial decision; and I apprehend that under such circumstances it is quite clear that this action can be supported.

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But then, my Lords, it is said that the action cannot be supported against these parties, as the act complained of was the act of the body. How can you bring an action, it is said, against them individually? My Lords, it was these individuals who did the wrong. They all of them refused to take Mr. *Young* upon trial, and they by their vote prevented his being taken upon trial by the others; they are the parties, therefore, that did the injury, and consequently they are subject to an action. Suppose it had been a unanimous vote; that all had concurred in it; the party sustaining the injury might, if he had thought proper, have brought an action against all of them, or against any one; because it is laid down as a general principle that torts are joint and several. It would not have been necessary for him to bring an action against all, if all had concurred, but he might have brought his action against any one or more of them, as he might think proper. Here he has brought his action against those who did the wrong, and they are clearly liable to make compensation and to give redress.

My Lords, it was suggested at the bar, in the course of the argument, that it is possible, as this was put to the vote, that some of these parties might have voted on the other side. Had that been the case, that circumstance, so far as such individuals are concerned, would have been a ground of defence; but that does not appear upon the record. It is not stated; it is not suggested. On the contrary, from the shape of the record, the conclusion is directly the other way.

My Lords, there is a case, which I believe was referred to at the bar, which, with respect to several of these points, appears to me to be closely in point. I allude to the case in *Carthew*, of *Rich v. Pilking-*

ton, Lord Mayor of *London* (r). That was an action brought against the Lord Mayor of *London* for a false return to a writ of mandamus. The objection made to that action was of this description:—"The act was done by the Lord Mayor and Aldermen; you ought to have brought your action against all." "No," said the Court, "it is a tort; it is joint and several. The party might have brought his action against all, but he was entitled also to bring his action against any one." It was stated that it was a corporation. "No," said the Court, "it is not a corporation; it is a Court; and, as a Court, the action may be brought against all the members, or against any one of them." Then this suggestion was made: "But how does it appear that the Mayor did not object to the return?" What was the reply of the Court? "Had it so appeared, or should it so appear upon the trial, that will be a defence to the action, so far as he is concerned, upon the plea of not guilty."

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My Lords, I think I have now adverted shortly, but I hope clearly and distinctly, to the different points in this case. The principle is this, that here was a public duty, which the parties were bound to perform; they knew that they were bound to perform it. They neglected that duty. Individuals have sustained injury in consequence of their neglect of that duty. It was not a judicial act; it was an act that was imperative upon them, and with respect to which they could exercise no discretion. These are the parties that did the act, and they are the parties, therefore, against whom the action is sustainable. I would submit, therefore, to your Lordships, with all deference, that the judgment of the Court below ought to be affirmed.

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Lord *Brougham* :—My Lords, agreeing entirely in the proposition which my noble and learned friend has submitted to your Lordships, I am quite sure that your Lordships will feel that I owe an apology, both to my noble and learned friend and to you, for entering at all at large into the question which he has so clearly, so luminously, and so satisfactorily treated ; nor should I have done more than express my entire concurrence, subject to a verbal alteration, which, in fact, my noble and learned friend himself, from the context, clearly intended ; that, instead of saying, “ that had they taken Mr. *Young* upon his trial, and decided against him by rejecting him, in that case they would have acted judicially, and so have been protected ;” my noble and learned friend of course, from the context of his argument, could only have intended to say, “ that that question not being now before us, but being shut out by the refusal to take him upon trial, it might, for aught we know, have been an argument competent to the Presbytery in the case supposed.” My Lords, I should, with that single qualification, which in fact is a mere verbal correction, have rested satisfied with expressing my entire agreement with my noble and learned friend, had it not been that the very great importance of the case, and the extraordinary notice which the circumstances of it have naturally excited, lead me to trespass upon the time and patience of your Lordships, by entering a little more fully into the case.

My Lords, the facts of this case are, as my noble and learned friend has justly observed, all admitted ; and it is material to note them, and to observe the shape of the action. The Court of Session in the former suit, which was brought against the Presbytery of *Auchterarder*, and also against the individual

members of its majority, after finding the rights of Lord *Kinnoull* as patron, the valid presentment of Mr. *Young*, and the continued refusal of the Presbytery to take trial of his qualifications, found that by his refusal the Presbytery acted to the hurt and prejudice of both pursuers, illegally, and in violation of their duty. This decree was affirmed by your Lordships upon appeal. Upon the proceeding below, to apply the judgment of affirmance, the Lord Ordinary pronounced an interlocutor, finding that the Presbytery and the individual members thereof are bound and adstricted to make trial of Mr. *Young's* qualifications, and if they find him qualified, to receive and admit him to the church of *Auchterarder* according to law. This decree was allowed to become final, and stands as such, unappealed from to this day.

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A fresh application was then made by the Respondents (the pursuers below) to the Presbytery and the individual members, who still refused to take Mr. *Young* upon trial. Two motions were made at a meeting of the Presbytery: one, that he be taken to trial; the other, that the presentation be referred to the next meeting of the commission of the General Assembly. The latter motion was carried by the voices of the present Appellants, the former motion being rejected; the refusal therefore was plain and deliberate.

The present action is brought, not like the former, against the Presbytery and the individual members forming the majority who rejected the motion, but against those individuals only; and it is brought for damages on account of that refusal. But it is observable that the summons concludes differently on behalf of the two pursuers (the Respondents here). After setting forth, "that both pursuers have sustained

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damage in consequence of the refusal to obey and give effect to the judgments of the Court of Session and of this House, and also in respect of the illegal and continued refusal to take Mr. *Young* to trial," the summons concludes "to have it found that the defenders (the Appellants here) should make reparation in damages to Lord *Kinnoull*, the patron, for the illegal refusal to take Mr. *Young* to trial; and that the defenders should make reparation to Mr. *Young*, the presentee, for the refusal to take trial of his qualifications, according to the judgments of the Court of Session and of this House." So that the conclusion for the patron is general, grounded on the illegal refusal of his presentee: the conclusion for the presentee is grounded on the illegal refusal to perform their duty, according to the judgment below and here.

This difference might be of importance, if it should appear that the decrees below and here in the former suit did not directly order the Presbytery to take the presentee to trial (which is certainly true), and if it should also be held that the general averment applicable to both pursuers extends over the particular conclusions of the summons. But it is clear that this is not the case. The general averment of damage sustained in consequence of the refusal to obey the judgments below and here may be incorrect, inasmuch as these judgments did not order the Presbytery to take Mr. *Young* to trial, but only declared the Presbytery bound so to do. But the conclusions, or at least the conclusion in behalf of the presentee only seeks for damages in respect of the injury arising from the defenders refusing to discharge their duty by taking to trial "in terms of the judgments," and these judgments clearly, by their terms, declare that duty.

The conclusion, “ for solatium to Mr. *Young*’s feelings, by the refusal to implement the judgments libelled on,” may be rejected as surplusage, if it should be held that the judgments libelled on do not command the taking to trial.

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Thus it is clear that there remain sufficient conclusions: one on behalf of the patron, without any reference to the judgments; the other on behalf of the presentee, referring to those judgments, but referring to them as declaratory, and not mandatory. Hence it is wholly immaterial were we to admit that no mandatory decree has been pronounced or can be libelled on, because the case of the Respondents must stand upon the right which the patron had to present, and he and the presentee had to have trial of qualification, independently of any judgment. Though the judgments make the duty of the Presbytery more plain, and their refusal to act in conformity with them more contumacious, and though, as regards the presentee, these judgments are libelled on, yet, as regards the patron, the ground is general, and even as regards the presentee there is a conclusion which does not assume any command in the judgment libelled on; so that the patron might recover upon the breach of duty were there no judgment at all, and the presentee may recover under the judgment, as the ground, the declaratory ground, of the duty alleged to have been violated.

The question then, and the only question is, whether the action for damages well lies against them individually for their refusal? The duty is declared by the original judgment affirmed in this House. If that judgment had not been libelled on at all it would have been decisive of the question, whether the Presbytery was or was not bound to take the pre-

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sentee to trial. If it had been between other parties, that judgment would have been of the highest authority, of the most binding force, as showing the duty of the Presbytery in the present case; but being a judgment between these very parties, and on this very cause, it has the force of a judgment in the cause, and it estops the parties to aver that the taking of the presentee to trial was not the bounden duty of the Presbytery.

So it would have been had the judgment not been libelled on at all; so it is in respect of the conclusion for the patron; but so it is yet more emphatically in respect of the conclusion for the presentee who libels upon that judgment, as declaring his right to be taken on trial. He comes not to demand execution of a mandatory decree; had he done so there might be some ground for the objection that the decree is not mandatory; but he wants no such mandatory decree. He complains of a breach of duty on the part of the Appellants by their refusal to perform the duty; and in proof of this duty, the refusal being admitted, he shows and he relies on the final judgment declaring that duty, although he might have relied on the same grounds on which that judgment was pronounced, and by which it may still be supported, independent of the respect due to the authority from which it proceeded.

We come then to the only question now properly in issue between the parties: "Can this action be maintained against these Appellants for their refusal?" If it be said that they are individuals, and not the Presbytery, and that the former action was against the Presbytery as well as the individuals, but the judgment was given only against the Presbytery, the answer is twofold. First, from what has been said,

the patron's conclusion rests on the general breach of duty, and not on the refusal to act according to the judgment; consequently this objection could at the utmost only affect the presentee's case. But, secondly, it is not applicable to that case either; for the interlocutor of the Lord Ordinary, now appealed from, on applying the judgment of this House, expressly finds that the individual members as well as the Presbytery are bound and adstricted to take the presentee upon trial. Therefore we come to the only question, "Does this action lie, in respect of the kind of duty alleged to be violated, the kind of body to which the Appellants belong, and the kind of proceeding in which they were engaged?"

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If the law casts any duty upon a person, which he refuses or fails to perform, he is answerable in damages, as my noble and learned friend has stated, to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable jointly and severally for the failure or refusal; and if it is a duty which the majority of the number is bound to perform, those who by their refusal prevent the greater number from concurring are answerable to the party injured; that is, all those who constitute a majority, such majority committing the nonfeasance, violate the duty imposed, disobey the law, occasion the injury, and are answerable for it.

Nor are these propositions the less true generally and as the rule, because there are exceptions, and a very few exceptions, introduced into the law and constitution of this and indeed of every country, from the necessities of the case. Thus the Legislature can of course do no wrong; but so its branches are placed beyond all control of the law. And the Courts of Justice, that is, the superior Courts, Courts of general

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jurisdiction, are not answerable, either as bodies or by their individual members, for acts done within the limits of their jurisdiction. Even inferior Courts, provided the law has clothed them with judicial functions, are not answerable for errors in judgment; and where they may not act as Judges, but only have a discretion confided to them, an erroneous exercise of that discretion, however plain the miscarriage may be, and however injurious its consequences, they shall not answer for. This follows from the very nature of the thing; it is implied in the nature of judicial authority, and in the nature of discretion, where there is no such judicial authority. But where the law neither confers judicial power, nor any discretion at all, but requires certain things to be done, every body, whatever be its name, and whatever other functions of a judicial or of a discretionary nature it may have, is bound to obey; and, with the exception of the Legislature and its branches, every body is liable for the consequences of disobedience; that is, its members are liable, through whose failure or contumacy the disobedience has arisen, and the consequent injury to the parties interested in the duty being performed.

The distinction in this respect seems to vanish even between the higher and inferior Courts,—those of general and those of limited jurisdiction; but for things done in the exercise of judicial functions inferior Courts are answerable, where the higher are not. A case in 3d *Leonard* shows, that even for doing a judicial act, that is, a proceeding to judgment and execution pending an appeal, namely, a *habeas corpus cum causa* to remove the plaintiff, the steward of a Court having jurisdiction in the matter may be liable to an action of damages.

It was at one time held that commissioners of bank-

rupt were protected by their supposed judicial functions; but this being fully considered in the case of *Miller v. Seare* (s), the Lord Chief Justice, and Mr. Justice *Blackstone* and Mr. Justice *Nares*, held (Mr. Justice *Gould* dissenting) that those commissioners were liable to an action of false imprisonment for having improperly committed a bankrupt who in the opinion of the Court had given a satisfactory answer, the commissioners not having deemed it satisfactory.

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It is true that in *Doswell v. Impey* (t), the Court so far differed with the former decision as to hold that the commissioners had the authority vested in them of determining whether they should be satisfied or not. But this was upon the words of the statute (u), "that the bankrupt shall full answer make to the satisfaction of the commissioners." And even in this view the Judges expressly said, "that they did not decide how it would have been had an action on the case, and not trespass, been brought;" and they expressly did hold that the commissioners were liable to criminal prosecution for any abuse of their authority. So that there was nothing decided, nor anything said, to shake the main part of the decision in *Miller v. Seare*, that the commissioners had not the protection enjoyed by Judges for their acts. Accordingly, in the subsequent cases of *Isaac v. Impey* (x), and *Crowley v. Impey* (y), no objection was taken to the action against the commissioners, but the contest arose upon whether or not the bankrupt or the witness had refused to answer.

It was afterwards by the new Bankruptcy Acts provided, that the Commissioners should have the

(s) 2 Sir W. Bl. 1141.

(t) 1 Barn. & Cress. 163.

(u) 5 Geo. 2, c. 30, s. 16.

(x) 10 Barn. & Cress. 442.

(y) 2 Stark. 261.

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protection of Courts of Record, that is, of the higher Courts; for the protection extends to all these, whether Courts of Record or not, as the High Court of Admiralty and Courts of Vice-Admiralty.

It has also been held that persons clothed with judicial authority, not being Judges of the higher Courts, are liable to an action for not executing duties cast upon them of a kind very nearly approaching to judicial; as in the case to which my noble and learned friend has referred, of *Green v. Bucklechurches* (z), which was an action against a justice for refusing to examine a witness necessary to give the party a remedy under the 27th of *Elizabeth*. The Courts have said, "These duties are not judicial, and therefore the action lies, though it is not easy to distinguish them from their judicial functions, and though it is quite certain that no such action would lie against Judges of the superior Courts." Certainly both the functions of the commissioners of bankrupt and those of justices of peace, and also those of stewards of Courts having local jurisdiction, are much more of a judicial nature than those of the Presbytery are in the matter of receiving a presentee, and taking him to trial of his qualifications.

It is not denied that the Presbytery has certain functions of a judicial or quasi judicial nature. It is not necessary, for the purpose of the present question, to inquire how far the discretion is vested in its members of deciding absolutely on the qualification of a presentee. It is not necessary now to go into the question how far they, being commanded to receive and admit the presentee, are compellable to do whatever is necessary for his reception and admittance.

(z) 1 Leon. 323.

These questions do not here arise, because the members of the Presbytery have resisted in the outset, by refusing to take the presentee on trial; and until they do so take him, no such questions can arise. No discretion is vested in them to refuse the trial. The law has been declared both generally and in this particular case, the Court below and your Lordships have decided, that there is no such discretion, and that the Presbytery is bound, without any option, to take the presentee on trial.

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But that which seems to make an end of this defence, the defence grounded on the alleged judicial character of the Presbytery, and which indeed goes far to make an end of the whole defences together, is the finding of the Court below, as affirmed in this House. When, I would ask, was such a finding ever applied to the proceedings of a Court having the protection of Judges for all their judicial acts? When was an act, either judicial or quasi judicial, of one tribunal, ever so dealt with by another and a higher tribunal? The judgment is, that the "said Presbytery have refused and continue to refuse to take the presentee to trial, on the sole ground that the majority of male heads of families, communicants in the parish, have dissented, without any reason assigned, from his admission as minister."

This is the alleged judicial act. The finding sets forth the act of refusal, and the reason assigned for that refusal. Then how does the judgment proceed to deal with this alleged judicial act? "Find, that the said Presbytery, in so doing, have acted to the hurt and prejudice of the pursuer, illegally, and in violation of their duty, and contrary to the provision of the statutes;" and this finding is affirmed by your Lordships on appeal.

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Now if any person will show me a similar judgment, lawfully pronounced by competent judicial authority; still more, a judgment from which there can be no appeal, pronounced upon the conduct of another body inferior, and which was a party to the suit in which the judgment was given; if any person will show me a judgment so pronounced by a superior tribunal, declaring the proceedings of the inferior body to have been had illegally and in violation of its duty, and to the injury of the party complaining, I shall then have no difficulty in knowing how to deal with the inferior body, and with any pretence which it may set up to the character of a judicial body, or any protection which it may claim for its acts as judicial acts. The judgment, in truth, by its frame, as completely negatives the taking on trial to be a judicial act, as it distinctly declares the Presbytery in refusing a trial to have been acting in a capacity other than judicial, as if it had in terms negatived the one of these propositions and affirmed the other.

Cases, and extreme cases, have been put in the argument with much ingenuity, and they share the fate of such suppositions when forced into the service of an untenable contention. They either may be admitted, and do not touch the question in hand, or they are so far doubtful as not to decide it. Thus it is asked if any one ever heard of a Judge being sued for not going into Court to try a cause, when the parties were ready at a great expense to proceed. The case in 1st *Leonard* shows that this at least will not apply to all the acts of inferior Judges. But suppose it were admitted that in the case put, no remedy lies against Judges of the superior Courts, the law and constitution have provided a remedy, by their removal, for a breach of duty, or neglect of

duty. What remedy is there against the Presbytery? None, but by appeal to the Synod, and ultimately to the General Assembly; and they who deny the Presbytery's responsibility to the municipal law, of course will also deny the responsibility of the Synod and the General Assembly, and deny also that the three branches of the Legislature concurring could remove the offending Presbyters, as they can remove the delinquent Judge, without any new law, or by a mere proceeding pointed out by statute. Here, then, would be a complete case of *imperium in imperio*; of bodies existing in the country, and exercising important functions,—functions nearly affecting the rights, the civil and patrimonial rights of the subject,—and yet not placed under any control of the law, nor rendering any obedience to those entrusted with the office of administering it. Nor must it ever be forgotten that to this conclusion the whole arguments of these Church Courts lead; that this is the very claim which they set up, more or less covertly, as suits the different stages of their contention; that, more or less concealed from our view, this is the doctrine which pervades their whole reasoning.

We have been assuming that the extreme cases put are clear in themselves, and have been admitting that they resemble the one in hand, which they do not. But is it quite certain that these extreme cases are so clear and incontestable as at once to dispose of the present question, even upon that admission? I greatly doubt it; even as to Judges of the higher Courts, I doubt it. The case put, of Members of this House not attending a Committee of Privileges, is quite clear by the common law of Parliament, and also by the declaratory words of the statute (the Bill of Rights). But if asked, whether a Judge is or is

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not liable to make reparation for the injury he may occasion, by wilfully and without reasonable cause, or any cause whatever but his own caprice, refusing to act judicially on a day when parties are prepared at great expense to try their cause before him, and then leaving the circuit town without performing his duty ; I can only say, that when such a case comes before me, I shall be ready to deal with it ; that at present I am not called upon to determine it, but that I am by no means prepared to admit it as clear law that no action will lie for such a breach of duty ; and unless it is perfectly clear, the reference to such a forced case nowise helps the argument, or speeds us towards a conclusion. That the superior Judges, even acting judicially, and in a matter in which they have unquestioned jurisdiction, may render themselves answerable to parties, appears to be admitted in the opinions delivered by the Judges in the case of *Miller*, trustee of *Haggart v. Hope* (a). Their Lordships there put cases in which a Judge would be liable to an action for injury done to a practitioner in deciding a cause, such injury being the statement of slanderous matter not necessary for the decision. It would be difficult for the same Judges to have adopted, as quite clear, the positions assumed in the present case as incontrovertible, on the absolute protection of Judges in acts of misfeasance and acts of nonfeasance, as connected with their judicial functions.

But it is far more fruitful, and more calculated to throw light upon the question, that we should look a little at cases more resembling the present, and at the rights of bodies whose functions more nearly approach those of the *Scotch Ecclesiastical Courts*.

(a) 2 Shaw's Appeal Cases, 125.

The Presbytery closely resembles the Bishop ; and its functions resemble his functions, in respect of the trial and admission of presentees. Now, as to the Bishop, he exercises his judicial functions by officers whom he appoints ; and these are to all intents and purposes Judges, exercising indeed very high judicial powers. If they exceed their jurisdiction, the Temporal Courts interfere to prohibit them ; if they persist, the Temporal Courts punish them, as for a contempt, by attaching them and imprisoning them ; so indeed do they the Judges of Admiralty Courts, even the Judge of the High Court of Admiralty itself, if he proves refractory and disregards their prohibition. And in all these cases the party aggrieved by the contumacy has his remedy by action against the Judge.

But this may be said to be a case where the Judges are acting without jurisdiction. If, however, after being commanded to desist, those Judges were to proceed, and to say that they proceeded because they judicially decided that they had jurisdiction, this would not avail them an instant, even in showing cause why they should not be attached by their bodies for their contempt, nor could any such averment be sustained or pleaded in justification to an action for the injury sustained. And yet what else than this is the defence now set up by the Presbytery against the complaint that they have refused to take upon trial according to their duty, declared by the supreme judicial authority of the country, an authority as competent to restrain them as the Temporal Courts are to restrain the Spiritual or Admiralty ? That authority says, " You are bound to take the presentee on trial ; you have no discretion or jurisdiction to refuse it." The members of the Presbytery

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say, "We will not, because it is our province to say whether we will take him on trial or not." And be it observed, unless they say as much as this, they say nothing at all to maintain their defence. But wherein does this differ from the case supposed, but which certainly involves too great a contumacy ever to have happened, of the Bishop or his Judge, or the Judge of the Admiralty, refusing to obey a prohibition, upon the ground that it is his province to determine whether or not he shall attend to it?

But this is not all. The present question regards only the refusal to take on trial,—the refusal to proceed. Nothing now arises upon the discretion of the Presbytery in conducting the trial. On that I give no opinion. Certainly I give none that differs from the *dicta* thrown out by some of the Judges below, particularly the Lord President. I only say, that we are not at present called upon to decide either way upon the point. The question before us merely regards the refusal of the Presbytery to proceed at all. Now, the Bishop with us, in whose place the *Scotch* Presbytery stands, is answerable in an action for not admitting a clerk; and though damages could not be recovered at common law, but only by the statute of *Westminster* the Second, from the law's extreme jealousy of simony, as Lord *Coke* says (*b*), the patron alone being the party demandant in such an action,—from another refinement of our law, which regards the interest of the clerk before institution as merely spiritual (a refinement wholly unknown in the law of *Scotland*),—yet the liability of the Ordinary to the real action by the common law shows plainly that he had no power, such as that claimed by the Pres-

(*b*) 2 Instit. 362.

bytery, of absolutely refusing the clerk, for whatever reason he might choose to assign, or without any reason at all.

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A case, however, exists more closely resembling the one in hand, and which is indeed considerably stronger, for the control of the Courts over the ecclesiastical authorities. I refer to *The King v. The Archbishop of Canterbury* (c), and *The King v. The Bishop of London* (d). By the statute of the 13th & 14th of Charles the Second, c. 4 (e), it is provided that no person shall be received as a lecturer, unless "he be first approved and thereto licensed by the Archbishop of the province or Bishop of the diocese;" and upon an application to the Court of King's Bench for a mandamus to the Bishop of *London*, commanding him to receive a person duly chosen to an endowed lectureship, and a rule nisi granted, it was discharged, upon a preliminary objection taken that it should have been directed to the Archbishop as well as the Bishop. We, however, who were of counsel for the rule, on renewing the application, were apprehensive that the Court could not compel the Bishop to license, and therefore only moved for a mandamus calling upon the Archbishop or Bishop to admit the lecturer to trial before them (for that was truly the substance of the application), and to license him, if he should be found a fit and proper person to preach the lecture. The affidavits against the rule set forth that the Bishop had repeatedly admitted the lecturer before him, and that after having heard him, and having made diligent inquiry respecting him, he had been convinced that he was not a fit person, and, for no other reason, had refused to license him. A great many particular facts

(c) 15 East, 117.
 (d) 13 East, 419.

(e) The Uniformity Act.

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were set forth in the affidavit, and the Court held that if the mandamus had issued, and if the matters on which the Bishop relied, and the statement of his having heard and inquired, had been returned to the writ, such return would have been conclusive; wherefore they discharged the rule and refused the mandamus.

Lord *Ellenborough*, in the powerful and elaborate judgment which he pronounced on the part of the whole Court, stated the authority of the Bishop to be, by the statute, so absolute, and the grant or refusal of a licence to be so entirely within his discretion, that he might have formed his opinion even upon matters within his own personal knowledge, such as recollections of what had passed when acquainted with the party at College. Nevertheless, he laid it clearly down that if the Bishop had not inquired,—if the Court had reason to believe that he had not effectually examined and deliberated before deciding, or that anything was defectively done in this respect,—then “the Court would interpose its authoritative admonition;” that is, grant a mandamus calling on the Bishop to inquire and examine: and the whole argument really turned upon this,—whether that which had been done amounted to an inquiry and examination; it being on all hands admitted that such preliminary inquiry, or some personal knowledge which superseded its necessity, was required, although the statute says nothing of inquiry or examination, merely giving the Bishop the power of approving; in order to the exercise of which power, the Court clearly held an inquiry of some sort necessary, but left the manner of conducting it to the Bishop, as well as the decision upon its result.

So in the case of Visitors whose power and discre-

tion is absolute, the Court will interfere by mandamus to put that power in motion, calling upon them to hear and determine, though after they have determined the Court cannot interfere; as in the case of *The King v. The Bishop of Lincoln* (f), *The King v. The Bishop of Ely* (g), and many other cases.

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It surely never can be contended that the Presbytery is invested with a more absolute discretion, nay, with so absolute a discretion as these cases recognise in the Bishops under the Uniformity Act, and the Visitors at common law; and yet the rule is clear that the Bishops will be compelled by mandamus to proceed as a Court of Inquiry.

It is equally clear that an action would lie at the suit of the party injured by a refusal to obey the writ in such cases, as an action would also lie for a false return to the mandamus. In what respect does the action against the Presbytery differ from an action against an Ordinary for refusing to hear and inquire in order to licensing, unless it be in this, that there may be no such absolute discretion vested in the Presbytery as has been recognised in the Ordinary and the Visitor.

It is, however, contended that the Presbytery being a corporate body, its individual members are not answerable in an action for corporate acts of misfeasance or of nonfeasance. To this it seems enough to answer, "That unless they are so made answerable, there is no remedy whatever for those whom the illegal conduct of the body may most seriously injure." There is a great laxity in the *Scotch* law as regards corporations. Almost any set of persons authorised in any way to act together, or continuing to act toge-

(f) 2 Term Rep. 338, n.

(g) 5 Term Rep. 475.

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ther for a length of time, seems to be regarded as a corporation. The entire merger of the individual member in the corporate existence, according to our *English* doctrine, may render the suing them separately difficult: and new corporations with us can only be created by statute, or by grant from the Crown; but when it is considered that almost every Royal Borough in *Scotland*, and even the superiors of many Boroughs of Barony, that is, many private persons, have the power of granting what is termed "Seal of Cause," which creates a corporation, surely it is impossible to allow a proposition that would lead to consequences so utterly inconsistent with all good government, nay, with all social order, as those which must flow from the notion that no individual corporator can be sued for wrongs done by the illegal conduct of the corporation, to which conduct he was a necessary party;—that the whole corporate body should be liable to process and to action, as in the case of a Bishop, parson, or other corporation sole, and no one member of a corporation aggregate, acting wrongfully, and preventing the corporation from performing its duty, or joining in its illegal and tortious acts,—seems an inconsistent and untenable position.

But there seems no ground for the position that even in *England* individual corporators cannot be sued. In the case of *The King v. The Mayor of Ripon* (*h*), Lord Holt cited *Enfield v. Hills* (*i*), to show that an action for a false return lies against particular persons; a mandamus having gone to a corporation, of which, it appears by the report of the same case (*k*), the defendant was a member, and he having procured the false return.

(*h*) 1 Lord Raym. 564.

(*i*) 2 Lev. 236; Sir T. Jones, 116.

(*k*) 2 Lev. 236.

In *Rich v. Pilkington* (l), an action for a false return to a mandamus was held to lie against the Lord Mayor of *London*, the return having been made by the Lord Mayor and Aldermen; and though in this case it was said that the Mayor and Aldermen were not a corporation, but only a Court, there can be no question that the corporate character belongs as little to the Presbytery as to such a body.

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In *Harman v. Tappenden* (m), although Lord *Kenyon* and Mr. Justice *Lawrence* expressed doubts how far an action lay, yet Mr. Justice *Lawrence* appears to hold that the action lay if the defendants had in their corporate capacity tortiously procured the acts complained of to be done by the corporate body; and both he and Lord *Kenyon* agree, that for injurious acts, wilfully and maliciously done, the corporators were liable in their individual character, though not for mere error of judgment.

Now, in the present case that is alleged and proved which is tantamount to malice; illegal conduct in violation of duty, and injurious to the party; and the conduct is alleged to be continued refusal to do an act declared by a judgment to be imperative. "The defenders have from the 2d of *July* 1839, and do still, illegally refuse to make trial."

In *Drewe v. Coulton* (n), and indeed in *Ashby v. White* (o), such averment seems to have been held sufficient allegation of malice. If the acts alleged to be illegal and in violation of duty, had been alleged in terms to have been wilfully done, there can be no doubt that this would have come up to an averment of malice. But the word "wilful" needs not to be used any more than the word "malice." The continued

(l) Carth. 171.

(m) 1 East, 559.

(n) 1 East, 563, n.

(o) 6 Mod. 45.

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illegal refusal is clearly equivalent to wilfully doing an illegal act.

In *Gray v. Forbes* (*p*), the individual liability of corporators appears to have been both supported by the interlocutors of the Court of Session, and sanctioned by the authority of this House upon appeal. An old case to the same effect was there referred to; *The Burgesses of Rutherglen v. Leitch* (*q*).

The Court below in giving, and this House in affirming, the decree against the majority of the Presbytery, do not incur, in the present stage of this unhappy controversy, the charge, so freely brought elsewhere, of violating the conscience of the Church Courts and their members. That topic has been abstained from, since the answer was more than once and in other kindred cases given to it, respectfully suggesting, that if any individuals should find obedience to the law of the land repugnant to their conscientious scruples, they had, if not a remedy for the grievance, at least an escape from its pressure, placed within their reach, and open to them of their own free will.

But other appeals of a like nature have been made. It has been said, that to suppose the Legislature, which acknowledged the Divine origin of the Church's powers, would ever intend to enforce their exercise by the sanction of temporal penalties, is to charge that Legislature with conduct as profane as it is absurd. Yet, the compelling men, and bodies of men, to exercise faculties which they have received from Heaven, is one of the most ordinary acts of legislative, of executive, and of judicial power: not to mention that it is the act of ordination itself, and not the preparatory process of trial, which the Church claims to have received from above.

(*p*) 5 Clark & Fin. 356.

(*q*) 8 July 1747.

But when these men seek to excuse themselves, to palliate, or rather to deny their contumacy, by asserting that they only desired to consult the General Assembly, their ecclesiastical superiors, they have fallen into a much more practical error; an error wearing a more sinister aspect, come of more base parentage, and fruitful of more dangerous offspring. "We had," say they, "on the one hand, the opinion of the Civil Court; on the other, the positive injunctions of our ecclesiastical superiors; and all we did was to refer to them for advice." Advice on what point? In what difficulty, touching what nice and perplexed matter, involved in what entangled controversy, was it that they required such a resort for light and help? No less nice and difficult and perplexing a question than whether they were to perform the duty in terms declared to be incumbent on them, declared by the supreme tribunals of their country, or to follow the advice of other persons, who had set themselves in opposition to the tribunals, and had commanded or enjoined them to disobey their decrees. And to whom do they resort for advice in this emergency, for a solution of this difficulty? Not to any impartial and unbiassed adviser, whose counsels it would be safe to follow, but to the party whence had proceeded the unwholesome advice to disregard the law. It is fit that these men should learn at length the lesson of obedience to the tribunals which have been appointed over them; a lesson which all others have long acquired, and which they, on learning it, should also practise. It is just that they should make reparation to those whom their breach of a plain duty has injured. The duty is not doubtful; the Courts have laid it down. Their failure is not a mistaken opinion; their fault is not an error of

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judgment; they knew what they ought to have done, and they refused to do it. The penalty of their transgression is, to make compensation to those whom they have injured by their pertinacious refusal to perform their duty and yield obedience to the law.

Lord *Cottenham*:—My Lords, I feel much satisfaction at finding that this case has been so deeply considered and so fully discussed by the noble and learned Lords who have preceded me. A very few sentences will be sufficient to express the grounds on which I concur in the opinion which they have stated to your Lordships, and upon which I consider that the interlocutors appealed from should be affirmed.

My Lords, I have not found during this discussion any real difficulty as to any of the propositions which were raised by the Appellants at the bar. The principal ground of defence which the Appellants relied upon was, that they were exercising certain judicial functions which as a Court they were competent to exercise; and that therefore they were not liable, if they had fallen into error in the exercise of those judicial functions.

My Lords, the interlocutor in the *Auchterarder* case, affirmed by this House, entirely excludes any such ground of argument. They indeed assumed in that case, as they have in this, that the law had reposed in them some discretion as to whether they should or should not take the party duly presented upon his trial. The interlocutor of the Court of Session decided that they had no such discretion, but that it was their bounden duty to do so; that they had no option; that it was a right which the party presenting was entitled to claim as against them; a public duty which they were bound to perform.

That, then, must be considered as the declared law of the land. In violation of that right, and in disobedience to that law, the proceedings in this case show that the Presbytery has refused to do that which, by that decision of the Court, it was bound to do. The result is, an injury occurring to the party who claims to be at least entitled to be examined, for the purpose of its being ascertained whether he was a person fit to be received into that piece of patronage for which he had been presented to the Presbytery.

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Then, if that be removed, the only other ground which was even open for argument was, that although that might be so, although the law had so declared, yet that they were not individually answerable for the course which has been adopted by the Presbytery at large; that is to say, that the individual members of the Presbytery were not liable for that which was the act of the body of which they formed a part.

My Lords, when the authorities in this country, but more particularly in *Scotland*, were examined, it appeared that there was no foundation whatever for that ground of defence. My noble and learned friends have referred to cases which have arisen in this country; but those which they have referred to as having been decided in *Scotland*, are of course much more applicable to the present case.

We have had in this House instances of actions brought against persons standing in the situation of trustees, for acts of omission on their part. And the case which my noble and learned friend on the wool-sack referred to, meets that objection to which I have last referred in its very terms.

In the case of the Magistrates of *Edinburgh*, there was a duty to be performed; they had neglected to perform that duty (and it is certainly not a less strong

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way of putting it where there is a positive refusal to perform it); from the neglect of duty by those magistrates of *Edinburgh*, an individual had sustained damage, and he brought his action and sought his remedy against the individuals; and it was held that he had a right so to do. Similar decisions have taken place in other cases in this country.

Then, my Lords, if there has been a wrong sustained; if that wrong has arisen from the body of which these individuals form a part having refused to do that which the law has stated they are bound to do, and damage has been sustained by an individual in consequence; and if in such cases the law be that the individual members of the body are all answerable in their own persons for the damage and injury so sustained; the whole case is exhausted, and the propriety of the interlocutor appealed from is established.

My Lords, there has not in my mind been raised any doubt as to the law applicable to these several branches of the case, and I have no hesitation in stating my opinion to be that the interlocutor ought to be affirmed.

Lord *Campbell*:—I am likewise of opinion that this interlocutor ought to be affirmed. The action is brought to recover a compensation for the loss which it is alleged the pursuers have sustained by reason of the defenders having refused to perform a duty cast upon them by Act of Parliament and the decree of a Court of competent jurisdiction.

Lord *Kinnoull*, the undoubted patron of the parish of *Auchterarder*, in due form presented to the living Mr. *Young*, a preacher of the Gospel, but not in holy orders. The presentation being intimated to the

members of the Presbytery, they refused to take Mr. *Young* on trial, because a majority of the male heads of families in the parish, in communion with the Church, disapproved of the presentation. An action was then brought by the patron and presentee against the members of the Presbytery, with a view to enforce upon them the performance of their duty to take the presentee on trial, that they might judge whether he was duly qualified to be ordained and inducted. In that action it was found and adjudged by the Court of Session, “that the defenders, the Presbytery of *Auchterarder*, did refuse and continue to refuse to take trial of the qualifications of the said *Robert Young*, and have rejected him as presentee, on the sole ground that a majority of the male heads of families, communicants in the said parish, have dissented, without any reason assigned, from his admission as minister, and that the Presbytery in doing so have acted to the hurt and prejudice of the pursuers, illegally, and in violation of their duty, and contrary to the provisions of the statutes libelled on.” The Presbytery having appealed against this interlocutor, it was affirmed by this House.

The judgment of your Lordships was to be applied by the Lord Ordinary, who pronounced a judgment finding and declaring, “that the Presbytery and the individual members thereof are still bound and adstricted to make trial of the qualifications of the pursuer *Robert Young*; and if in their judgment, after trial and examination in common form, he is found qualified, to receive and admit him minister of the parish according to law.” This judgment of the Lord Ordinary, against which there was no appeal, was duly intimated to the defenders, who are members of the presbytery of *Auchterarder*, at a meeting of the

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presbytery, and they were requested to take Mr. *Young* on trial accordingly; but they refused to do so, and referred the matter to the commission of the General Assembly. In consequence, Mr. *Young* has never been taken on trial or admitted as minister of the parish, and has lost the profits of the living.

On these facts, my Lords, I am of opinion that this action is well brought. I conceive that by the law of *Scotland* as well as by the law of *England*, and I believe by the law of every civilised country, where damage is sustained by one man from the wrong of another, an action for compensation is given to the injured party against the wrongdoer.

In this case, if there be injury, there seems to be no doubt of the damage; for Mr. *Young* is thereby deprived of the status of minister of *Auchterarder*, together with the temporalities of the living. The patron, likewise, must be considered as suffering a damage for which he is entitled to compensation, if there be an illegal refusal to admit his presentee in violation of the rights conferred upon him both by common and statute law.

My Lords, is it not equally clear that the defenders were guilty of a wrong when they refused to obey the law as declared and adjudged by the Court of Session and this House? The duty of taking on trial, and admitting, if duly qualified, the presentee of the lawful patron, was cast upon the members of the Presbytery, who ought to have been aware of that duty when they themselves, being presented by the patrons of their respective parishes, were taken on trial and admitted members of the Presbytery. They ought to have been aware that while they continued members of the Presbytery they could not get rid of the duties incumbent upon them in that capacity. They might

have known that the law of the land affecting the civil rights of the lieges can only be altered by the Legislature, the supreme authority in the State. The rights of patrons, recognised by the most ancient and venerable authorities in the law of *Scotland*, are anxiously guarded by the Acts of Parliament establishing the Reformed Presbyterian Church of *Scotland*; and by the Act of the 10th of *Anne*, chap. 12, which we must consider binding, although it has been said to be *ultra vires* of the British Parliament, it is expressly enacted, "That the Presbytery of the bounds shall receive and admit such qualified person minister as shall be presented by the patron."

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But whatever doubt may be supposed to have existed was removed by the solemn judgment of the Court of Session and of this House; and the Lord Ordinary was unquestionably authorised in pronouncing the interlocutor, whereby the defenders must be considered to have been required to make trial of Mr. *Young's* qualifications, and if he were found qualified, to admit him minister of the parish. The refusal to obey the lawful decree of a Court of Justice is certainly a wrong. We have here, therefore, the conjunction of wrong and loss;—of wrong committed by the defenders, and loss suffered by the pursuers, out of which an action arises; and *prima facie* the action is maintainable.

I will now consider the several objections to the action brought forward on the part of the Appellants.

In the first place, it is said that the Presbytery is a Court, and that this was a judicial proceeding; wherefore no action can be maintained against the members of the Court although their judgment be erroneous. There can be no doubt that for many purposes the Presbytery is a Court, and that it has not

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only ecclesiastical functions, but jurisdiction in certain civil matters, such as the allotting of glebes, and the repair of kirks and manses. Where the Presbytery is acting judicially, or in any matter where its members have a discretion to exercise, no action could be maintained against them, at least without malice expressly charged and clearly proved. If they had taken Mr. *Young* on trial, and adjudged that he was not qualified, from being *minus sufficiens in literaturâ*, or from any objection to his orthodoxy or his morals, or that from some personal defect he was incapable of satisfactorily serving the cure, their judgment could not have been reviewed by any Civil Court; and certainly no action would have lain against them on the allegation that in truth he was well qualified and free from all objection. The Church judicatories, acting within their jurisdiction, must ever be respected and upheld. But when the members of the Presbytery were required to take Mr. *Young* on trial, in my opinion they were required to do a mere ministerial act. Touching that act they had no discretion; they had no judgment to exercise. How then could it be judicial? There is no difficulty whatsoever in separating the act of appointing him to appear before them to be examined, and the act of forming a judgment upon his qualifications when he has appeared before them and been examined. It is for a refusal to do the first act that this action is brought, and the first act is purely ministerial.

Where there is a ministerial act to be done by persons who on other occasions act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion entrusted to them. There seems no reason why the refusal to do a ministerial act by a person who has certain judicial

functions should not subject him to an action, in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as Judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction he has ceased to be a Judge. As to the ministerial act, which may be initiatory to a judicial proceeding, he is not yet clothed with the judicial character.

In the able argument on behalf of the Appellants at the bar, it has hardly been denied that the action is maintainable, if the act to be done was of a ministerial nature; for the general proposition that public functionaries appointed to act ministerially are liable to an action at the suit of any one who suffers damage from their breach of duty, was not disputed. Every thing, therefore, turns on the quality of the act; and how is the act of the Presbytery in taking the presentee on trial, to be distinguished from the act of the Archdeacon or of the Bishop in inducting to a living? The Archdeacon and the Bishop have both judicial functions; but in inducting to a living, where the right is ascertained, they have to do a ministerial act; and for wrongfully refusing to do that act the law gives an action to recover damages against them, to the parties aggrieved.

At common law there were no damages in *quare impedit*, because this was in the nature of a real action to try the right of advowson; but for a refusal to admit after a judgment in *quare impedit*, I have no doubt that damages might have been recovered at common law.

Is there not a ministerial duty cast upon the Presbytery by 43 *Geo.* 3, cap. 54, sec. 16, to take a person elected parish schoolmaster on trial as to his suf-

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ficiency for the office in respect of morality, religion, and literature; and would not a person so elected have a remedy against the members of a Presbytery who refused so to do, whereby he could not be admitted to his office?

The members of Presbytery need not feel their dignity hurt by this doctrine; for I humbly apprehend it would apply to the supreme Judges of *Scotland*, the senators of the College of Justice. By the *Scots Statutes*, 1579, chapter 93, and 1592, chapter 134, it was enacted, that "when the place of any ordinary Lord of Session became vacant, the Crown was to present and nominate a man that feared God, was of good literature," and other qualifications enumerated, "who should be first sufficiently tried and examined by the Lords of Session; and in case the person presented should not be found so qualified by them, it should be lawful to the said Lords to refuse the person presented to them, and the King's Majesty was to present another so oft as he pleased, till the person presented were found qualified."

After the case of *Haldane* (r), who, in 1722, being appointed a Lord of Session by the Crown, was rejected by the Court as disqualified, but found on appeal to be well qualified by this House, the *British* statute of 10 *Geo.* 1, c. 19, passed, by which the examination of the person nominated Judge, by the Judges of the Court of Session, is continued; and if the person so nominated shall on such examination be found duly qualified, then they shall forthwith admit and receive him; but if they think there is just ground to object to the qualifications of the person so nominated, they are to lay the whole matter before the King, who may either order him to be admitted, or may nominate another in his place.

(r) *Robertson's Appeal Cases*, 422.

The trial is still necessary, and, as is well known, the Judge appointed by the Queen's letter must first give proof of his learning and skill as Lord Probationer, before he takes his place on the bench, and is admitted as a member of the Court. During the present session your Lordships have had the advantage of having laid before you two most excellent experimental judgments, by Lord Probationer *Ivory* and Lord Probationer *Murray*.

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Now, my Lords, if we may conceive (what can never happen) that the Judges of the Court of Session should pass an Act of Sederunt to the effect that Judges ought not to be intruded on the College of Justice, and that the Court would not take on trial any one appointed by the Crown to be a Judge, if a majority of the advocates and writers to the signet practising in the Parliament House should, without assigning any reason, dissent from the appointment, and afterwards putting this Veto Act in execution, should, on the sole ground of the dissent, refuse to take on trial a person duly appointed a Judge of the Court by the Queen's letter,—still more, if upon appeal to the House of Lords, this Veto Act being adjudged to be illegal, null, and void, there should be a declaration by this House that the Judges of the Court of Session were bound and adstricted to take the party on trial, and they were still positively to refuse to do so,—I cannot doubt that, having been thereby guilty of a breach of the law, they would be liable in an action to make reparation in damages to him who had suffered a loss from their wrong. Of law, I hope it may ever be said with truth in this country, "All things do her homage; the very least as feeling her care, and the greatest as not exempted from her power."

But it is said that this action is an interference

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with the right of the Church to confer holy orders. God forbid that a Civil Court should exercise a judgment as to whether any one is qualified to preach the Gospel or to administer the sacraments! But I entertain no doubt as to the jurisdiction of Civil Courts to command the proper ecclesiastical authorities to inquire whether a person is so qualified, who, if he be so qualified, is entitled by law to a certain status in the Church; and if they find him so qualified, to do what is necessary to enable him to enjoy his preferment.

By the Act of Uniformity, 13 & 14 *Charles 2*, c. 4, s. 19, no one may preach as lecturer in any church unless he be first approved and thereunto licensed by the Archbishop of the province or the Bishop of the diocese. Can the Archbishop and Bishop refuse their licence as they please? No. The Court of King's Bench will compel them to grant a licence to a person appointed to a lectureship, or to give a sufficient reason why they refuse to do so.

In the case of *The King v. The Churchwardens of St. Bartholomew*, in 12 *Will. 3* (s), it was held by *Holt*, Chief Justice, "that though it was punishable by the statute for any person to be lecturer and preach without licence, yet the Ordinary had no power over the right; nor has he an arbitrary power to license or not, but was bound, *ex justitiâ*, to license if the person were orthodox, an honest liver, and loyal."

So, upon an application for a mandamus to compel the Bishop to grant a licence under the Act of Uniformity, *Lee*, Chief Justice, said, "There can be no question but this Court hath jurisdiction in all cases of this nature; but the question is, whether this be a

(s) 13 East, 421, n.

proper case for the Court to exercise that jurisdiction? Where a person appears to have a right, this Court will compel the Bishop to grant a licence, or show good reason to the contrary." In *The King v. Bloer*, Lord *Mansfield* said, "If the Bishop had refused without cause to license him, he might have had a mandamus to the Ordinary, to compel the Ordinary to grant him a licence."

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In *The King v. The Archbishop of Canterbury* (t), which was referred to by my noble and learned friends, Lord *Ellenborough* lays down the law upon this subject with his usual force and perspicuity; and in *The King v. The Bishop of London* (u), he holds that the Bishop has not an arbitrary power of refusing a licence, but must exercise his discretion fairly upon the fitness of the person applying to him, *secundum æquum et bonum*. And he says, "Suppose he should return *non idoneus* generally, can we compel him to state all the particulars from whence he draws his conclusion? Is there any instance of a mandamus to the Ordinary to admit a candidate to holy orders, or to specify the reasons why he refused? If, indeed, it had appeared that the Bishop had exercised his jurisdiction partially or erroneously, if he had assigned a reason for his refusal to license which had no application and was manifestly bad, the Court would interfere."

In that case, the rule for a mandamus was discharged on an affidavit by the Bishop that the party applying had been admitted to his presence, with a view to his being approved and licensed; that he had made diligent inquiry concerning his conduct and ministry, and, being convinced from such inquiry that he was not a fit person to be allowed to lecture, he

(t) 15 East, 117.

(u) 13 East, 419.

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had conscientiously determined, after having heard him, that he could not approve or license him.

The *English* authorities differ as to whether the Bishop is bound to specify his reasons; it having been held in *Specot's* case (*x*) that he must; but they all agree, that if an insufficient reason is assigned, he may be compelled to proceed to do the acts as Ordinary which are necessary to enable the party with the inchoate right to enter into full possession of the benefice.

So, if the Ecclesiastical Court in a process of deprivation, is proceeding within its jurisdiction to deprive for what would be just ground of deprivation, as immorality, heterodoxy, or disobedience to the canons of the Church, no Civil Court would interfere; and an erroneous judgment would only be ground of appeal to a superior Ecclesiastical Court. But *Free v. Burgoyne* (*y*) shows that prohibition will be granted by the Civil Courts if the Ecclesiastical Courts are proceeding to deprive for that which is not just cause of deprivation; and a sentence of deprivation showing, *ex facie*, that it was founded on that which would not be just cause of deprivation, would be a nullity.

All proper respect is to be shown to ecclesiastical authority; but authority must be defined, or despotism would be established, and true religion would be sacrificed to the ambition of those who delude themselves into the belief that they are consulting its best interests.

The counsel for the Appellants strongly urged that they were only liable to be dealt with criminally for what was acknowledged to be disobedience to the law;

(*x*) 5 Rep. 57.

(*y*) 5 Barn. & Cres. 400; 8 Bli. 65.

and it was assumed that in *England* no action would lie for damages arising from a refusal to obey a mandamus. The common remedy is certainly by attachment, because it is more speedy and more effectual; but I by no means agree to the position, that if, after a mandamus ordering an act to be done, or cause shown to the contrary, and a return made being set aside as insufficient, an absolute mandamus were to go and to be disobeyed, an action would not lie. Suppose a mandamus to churchwardens to make a rate under the Church Building Act, for the purpose of paying off a debt charged upon the church rates, it might be no remedy to the creditor merely to put the churchwardens in prison; but an action would enable him to get at their property; and according to all principle and analogy, such an action is maintainable. Where an award is made under a rule of Court there may be an attachment for the contempt, or an action for nonperformance of the award. The rule propounded by the Attorney-general, that there is no mandamus where there is an action, and no action where there is a mandamus, is not universal, and at any rate applies only to the original grant of the mandamus, and not to the remedy for disobeying it. Although there might be a charge of horning against these defenders for disobedience to Lord *Murray's* interlocutor, no authority has been cited to us to show that an action for compensation in damages is incompetent.

The difficulty pointed out, of finding on which side the different members of the Presbytery voted, would apply to a criminal as well as a civil proceeding; for those members of the Presbytery who were desirous of obeying the law could not be liable to punishment, and it would be incumbent on the prosecutor to show

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who were contumacious. It seems strange to make this objection, when the defenders admit on the record that they were members of the Presbytery of *Auchterarder*, and that they refused to take the presentee on trials. I must observe likewise that the action is not brought for the act of the majority, but against each defender for his own delict, from which damage has accrued to the pursuers.

This reasoning answers the objection that the Presbytery is not sued as a body. It would have been preposterous to have sued the Presbytery as a body, or to have made the Presbytery as a body co-defender with the individual members sued. Proceedings may be taken against the Presbytery as a body, to compel it to do an act which as a body it must do; but as a body it cannot be sued *ex delicto*. Suppose a Court is constituted of a single Judge, if an action is brought against him for any excess of jurisdiction he is not sued as a Judge, but as an individual who assumed to act without authority. If the Court consisted of several who concurred in the act, they would likewise be sued as individuals, and those only are to be sued who concurred in the act. The action is not against the Court, but against individuals who have committed a wrong; so if the members of the Court are required by law to do a ministerial act, and they refuse, the wrong is by the refusing individuals, and against them only is the remedy. Each dissenting member of the Presbytery would have been guilty of a wrong, even if a majority had taken the presentee on trial; but that would have been a case of *injuria absque damno*, and no action would have arisen; but when there is a conjunction of wrong and damage, the injured party may, at his election, sue the whole or any portion of the wrongdoers.

Next it is said, the summons is bad, as it contains no allegation of malice. Where the Judge of an inferior Court, acting within his jurisdiction, from corrupt motives gives a wrong decision, malice is the foundation of any action against him, and malice must be alleged and proved. But this action is for a refusal to do a ministerial act, and the summons shows that the defenders have committed a wrong which has worked damage to the pursuers. I must likewise observe that malice in the legal acceptance of the word is not confined to personal spite against individuals, but consists in a conscious violation of the law to the prejudice of another. The facts charged and admitted in this case amount to a deliberate disobedience of the law of the land, the necessary consequence of which is a prejudice to the pursuers; and it is a well-established maxim that every one must be taken to intend the necessary consequence of his deliberate acts.

Then we are told, that the action cannot be maintained, because there was no mandate in the original interlocutor of the Court of Session affirmed by this House, or in the last interlocutor of the Lord Ordinary, from which there was no appeal; and that without a mandate, the Presbytery was at liberty to refer the matter to the General Assembly. I conceive that the declaration, that "the refusal of the Presbytery to take the presentee on trials was illegal and in violation of their duty, and that they were bound and adstricted to take him on trials, and if found qualified, to admit him minister of the parish," is equivalent to a mandate to that effect. The duty to do a specific act being declared, the law commands that it shall be done. The reference to the General Assembly was, under these circumstances, a mere evasion, and was

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tantamount to a direct refusal ; it may be likened to the resolution of a vestry to adjourn for a year when a motion has been made for a church rate, which has been clearly held to amount to a refusal to grant any rate. The reference to the General Assembly, the authors of the Veto Law adjudged to be invalid, was a mere defiance of the Courts which had pronounced that judgment.

Perhaps I ought to notice the argument, that, at all events, this is a case of *injuria absque damno* ; because the patron is indemnified by the vacant stipend ; and the presentee, with respect to the temporalities of the living (which alone can be the subject of compensation), till in holy orders has neither *jus in re* nor *jus ad rem*. But, without at all considering the question whether the patron, under the circumstances, is entitled to the vacant stipend, or the uses to which it is to be applied, this boon never could be given to him as a satisfaction for the wrongful act of the Presbytery in violating his right of patronage, and cannot be considered the measure of the damage which he thereby sustains. As to the presentee, he is debarred from his *status* as minister of the parish of *Auchterarder*, to which, in the absence of all objection to him, we are bound to suppose he is entitled, together with the profits of the living.

The doctrine has been hinted at by the counsel for the Appellants, rather than explicitly announced, that the spiritual office of minister of a parish in *Scotland* may be entirely separated from the temporalities, and that the Church, renouncing the temporalities, may dispose of the spiritual office as it pleases. To this doctrine I, for one, beg leave to express my dissent. By the law of the land, in framing which the Church was a party, the temporalities are united to the spi-

ritual office; and this office, with the temporalities, is to be enjoyed by the person, duly qualified, presented by the patron, the authorities of the Church being the sole judges of his qualifications. There is a civil right to this office, which the Civil Courts will recognise and vindicate. A renunciation of the temporalities of the Church, with a view to retain spiritual jurisdiction, cannot be made by those who continue members of the Establishment.

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But the defence is explicitly and broadly put forth, that the defenders are bound by the Veto Law, and not by the decrees of the Court of Session or of this House, because "they have come under the most solemn obligations to conform themselves to the discipline of the Church, and the authority of its several judicatures."

My Lords, it is impossible not to respect those who are actuated by the construction they conscientiously put upon an oath, however erroneous it may be; but, my Lords, it is my duty to say, that all oaths of obedience to superiors are attended with the implied condition that their commands are lawful. From the time of *St. Thomas d Becket* till now there has been no such pretension in any part of this island as that ecclesiastics, in the exercise of a *liberum arbitrium* inherent in them, are of their own authority conclusively to define and declare their own power and jurisdiction, and that no civil tribunal can call in question the validity of the acts or proceedings of any ecclesiastical Court. In the most palmy days of Popery in *England*, if "the Courts Christian" exceeded their jurisdiction, as if they were seeking to enforce an unlawful canon, instead of appealing to the Archbishop or to the Vatican at *Rome*, an application was made to the Courts of *Westminster* Hall for a prohibi-

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tion ; the prohibition was granted, and the law would easily have vindicated its dignity if the Bishop had insisted on proceeding in the face of the prohibition. I am not aware that the Roman-catholic Church in *Scotland* claimed a higher exemption from civil authority than the Roman-catholic Church in *England*, or that the founders of the Reformed Presbyterian Church in *Scotland* claimed for it a higher exemption from civil authority than the Roman-catholic Church to which it succeeded.

The controversy out of which this action springs depends upon the construction of certain Acts of Parliament which regulate and protect the rights of patrons. It is surely for the Supreme Court of this empire to put a construction upon these Acts. Having done so, and declared the Veto Act to be illegal and void, can the defenders be heard afterwards to say that they are still ordered by their ecclesiastical superiors to be guided by the Veto Act, and that they are bound to obey their ecclesiastical superiors ?

Finally, we were much pressed with the hardship to which the Appellants are exposed by being held liable to actions for acting according to their consciences. I do not think, my Lords, that where the law is clear, the hardship of being obliged to obey it is a topic that can be listened to in a Court of Justice. There can be nothing more dangerous than to allow the obligation to obey a law to depend upon the opinion entertained by individuals of its propriety, that opinion being so liable to be influenced by interest, prejudice, and passion ; the love of power, still more deceitful than the love of profit ; and that most seductive of all delusions, that a man may recommend himself to the Almighty by exercising a stern control over the religious opinions of his

fellow men. The danger of setting conscience against law has been recently illustrated both in *Scotland* and in *England*, by the refusal, on the score of conscience, to pay contributions for the maintenance of the clergy and the Church, which the law has enjoined. Whilst the Appellants remain members of the Establishment, they are, in addition to their sacred character, public functionaries appointed and paid by the State, and they must perform the duties which the law of the land imposes upon them. It is only a voluntary body, such as the Relief or Burgher Church in *Scotland*, self-founded and self-supported, the members of which can say they will be entirely governed by their own rules.

In conclusion, my Lords, I hope I may be permitted to express my heartfelt grief at the unfortunate course which the Appellants have pursued in resisting the authority of the Court of Session and of this House, to enforce the Acts of the Legislature. The son of a minister of the Church of *Scotland*, and reared in her bosom, I have ever professed and felt for her the deepest veneration and the warmest affection. I believe that no church ever more effectually attained the great ends of an Establishment, in instructing the people in the truths of religion, and edifying them by its consolations. I believe it is mainly owing to the ministrations of her clergy that the inhabitants of *Scotland* have been so remarkable for orderly, industrious, and pious habits. I earnestly wish permanence and prosperity to her, and that she may dispense the blessings of the true faith to distant generations. But for this purpose her present members must respect the supremacy of the law, as their predecessors have done; and it can be no disparage-

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ment to them to follow such illustrious examples as *Moncrieff* and *Erskine*, *Robertson* and *Blair*.

If there be any Acts of Parliament on the statute book which are supposed to stand in the way of salutary reform in the Church, let there be an application to Parliament that they may be modified or repealed, and I am sure that it will be received with the highest respect for the applicants, and the most sincere desire to comply with their wishes; but a defiance of Courts of Justice and of the Legislature, inevitably leads to confusion and mischief; and a perseverance in such ill-advised counsels must either end in the total subversion of the Establishment, or in a schism which would for ages impair its respectability and usefulness.

The following order was afterwards entered on the Journals:—

“It is ordered and adjudged, by the Lords Spiritual and Temporal, in Parliament assembled, that the said petition and appeal be, and is hereby dismissed this House; and that the said interlocutor therein complained of be, and the same is hereby affirmed. And that the Appellants do pay or cause to be paid, to the Respondents, the costs incurred in respect of the said appeal.”—*Lords’ Journals* for 1842, p. 528.

FRANCIS HAMILTON, Esq. - - - - *Appellant.*

MARY HAMILTON, JESSIE HAMILTON,
JAMES HAMILTON, and ARCHIBALD
HAMILTON, Children of *Archibald*
Hamilton, Esq., deceased - - - } *Respondents.*

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M. C., an unmarried woman, while living with her mother, had two children by *A. H.*, a single man, who gave bond to the parish to indemnify it against their maintenance. He afterwards changed his residence, and *M. C.* went, with her two children, to reside in his house, and so resided till his death. Shortly after this change of residence he obtained from his law agent a form of words necessary, by the *Scotch* law, to constitute a marriage. He then wrote this note: "My dearest *May*,—I hereby solemnly declare that you are my lawful wife, though for particular reasons I wish our marriage to be kept private for the present. I am your affectionate husband, *A. H.*" This note was addressed, inside, to "*M. C.*," but outside, to "*Mrs. A. H.*" He deposited the note with the law agent, saying "it would please and satisfy her," but directed the agent to keep it a secret till his, *A. H.*'s, death. *A. H.* always represented himself to his relations as a single man.

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Proof of.
Husband and
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Agent.

HELD that a valid marriage had been constituted between these parties; that the words of the paper were sufficient for that purpose, so far as the man was concerned; and that his conduct and expressions to the law agent, together with the subsequent residence of the woman with him, must be taken as evidence of her knowledge of the paper, and her assent to it.

The law agent was, under the circumstances, here equally the agent of the wife as of the husband, for the purpose of the custody of this paper.

THIS was an action of declarator of illegitimacy, instituted by the Appellant, who claimed to be next of kin and heir-at-law of *Archibald Hamilton*, deceased. The question at issue was raised on the face of the summons, which, after setting forth that the Respondents were born of *May Clark*, and that *Archibald Hamilton*, the Appellant's brother, who died in *February* 1823, was alleged to be their father, pro-

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ceeded in these terms :—“ That the said *Archibald Hamilton* was never married to the said *May Clark*, nor were the said *Archibald Hamilton* and *May Clark* by habit and repute husband and wife ; but the said *May Clark*, in so far as she was known to be connected with the said *Archibald Hamilton*, was known only, and declared by himself to his friends and acquaintances, to be a person with whom he lived in illicit intercourse, and as the mother of the said children : That the said *Archibald Hamilton* was always known, and held and reputed to be, an unmarried man, down to the period of his decease as aforesaid, and he was buried as an unmarried man : That the said *Mary Hamilton*, *Jennet* or *Jessie Hamilton*, *James Hamilton*, and *Archibald Hamilton*, are bastards, or at least are not the lawful children of the said *Archibald Hamilton*, and they were never legitimated, and have no title to any of the civil rights which would have been competent to his lawful children : nevertheless they falsely pretend that they are the lawful children of the said *Archibald Hamilton*, in prejudice of, and to the great hurt and injury of, the pursuer, who is his nearest and lawful apparent heir as aforesaid : Therefore it ought and should be found and declared, by decree of the Lords of our Council and Session, that the said *Mary Hamilton*, *Jennet* or *Jessie Hamilton*, *James Hamilton*, and *Archibald Hamilton*, are bastards, or at least are not the lawful children of the said *Archibald Hamilton* ; their mother, the said *May Clark*, never having been married to him ; and that, therefore, they have on title to any of the legal or civil rights which would have been competent to his lawful children.”

Defences were lodged by the Respondents, and evidence, parole and documentary, was adduced on both sides to a considerable extent.

The facts of the case were these:—*Archibald Hamilton*, the father of the Respondents, was a surgeon in the army, and was commonly called *Dr. Hamilton*. On leaving the service he came to reside in *Edinburgh*, where his sisters had a house, and he resided with those sisters for some years. He formed a connexion with *May Clark*, the mother of the Respondents, a person in a rank of life much inferior to his own. At the commencement of that connexion the parties did not reside together, and the connexion was at first undoubtedly illicit.

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About the year 1816 or 1817, the attention of the parochial authorities had been directed to the situation of the Respondents' mother, who then resided in the *Canongate of Edinburgh* with two of the Respondents, *Mary* and *Jennet Hamilton*. To prevent any proceedings for ejecting the Respondents' mother from their residence, *Dr. Hamilton* at that time came forward, and, along with a friend, entered into an obligation that these two children, therein described as illegitimate, should not become a burden on the parish.

About *Whitsuntide 1817*, *Dr. Hamilton* took a house in *Brown-street, Pleasance*, whither he removed from his sisters' residence, and lived with *May Clark* and the two children. He twice afterwards changed his residence, and on each occasion *May Clark* and the children removed with him and lived with him. Two other children were afterwards born, and all lived together in one house till *Dr. Hamilton's* death, in 1823.

On the 26th of *September 1817*, *Dr. Hamilton* addressed to the Respondents' mother a letter, expressed in the following terms:

“*Edinr., September 26, 1817.*

“My dearest *May*,—I hereby solemnly declare that you are my lawful wife, tho', for particular reasons,

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I wish our marriage to be kept private for the present.

I am your affect. husband,

“To *May Clark*.”

“*Ar. Hamilton.*”

Addressed on the back, “*Mrs. A. Hamilton, Brown-street, Pleasance.*”

This letter was deposited with a Mr. *Dickie*, who had done some law business for the Doctor, and the circumstances of that deposit were those on which the Appellant mainly relied in the Court below, in order to prove the insufficiency of the proceeding to constitute a marriage and to legitimate the children. Those circumstances were thus stated in the evidence of Mr. *Dickie*, who was examined as a witness for the Appellant:—“That in the year 1817 or 1818, the Doctor waited upon the deponent, and stated that he wished to execute some writing by which the said person might be enabled to receive the pension of an army surgeon’s widow: That the deponent stated to the Doctor that, in his opinion, that could only be done by making her his wife; to which the Doctor replied, that that he never would do; but he stated, at the same time, that he wished the deponent would give him the form of an acknowledgment of the defenders’ mother as his wife, and that he would leave it in the deponent’s hands, and repeating that he would not make her his wife, and that, therefore, he would not deliver the document into her possession: That the deponent then wrote out two lines of a simple acknowledgment of the defenders’ mother as his wife, which the Doctor took away with him. Depones, that in a short time, which might be within a week or a fortnight, the Doctor returned, bringing with him the acknowledgment written in his own hand, and subscribed by him, and addressed to the defenders’ mother, and he delivered it to the deponent, requesting him to be the

custodier of it, and expressed an anxious desire that it should be so arranged, that, in the event of the deponent's death, it should fall into no hands but the Doctor's own; and that the deponent then, in presence of the Doctor, put the acknowledgment in an envelope, upon the back of which the deponent wrote, 'To be delivered into the hands of *Archibald Hamilton*, Esq., unopened;' and it was then sealed with the Doctor's seal, as the deponent thinks: That the deponent does not recollect that anything farther passed on that occasion: That either on that occasion or the previous one, but he thinks upon that occasion, he mentioned to the Doctor his opinion, that a latent document of the above description would not avail him with reference to the object in view, of obtaining a pension of a widow; on which the Doctor remarked, that it might be so, but it could do no harm, and might be of use. Deponent retained the said document in his possession during Dr. *Hamilton*'s life: That he considered himself the holder of the document on the Doctor's account only, and he would have delivered it to him if required: That when on his deathbed the Doctor sent for the deponent, and put into his hands a deed of settlement which he had executed some time before, and gave the deponent instructions to make some alterations upon it: That the deponent took a note of these at the moment, and prepared a codicil in terms of the instructions so received, which he took to the Doctor's next day, when it was executed; and the deponent produces the settlement and codicil, which is marked by him and the commissioner as relative hereto. On the first occasion, when the deponent called, he saw the defenders' mother, who was with the Doctor in the bedroom; she left the room, and the Doctor then said she was the person the deponent knew about, and

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reminded the deponent of the letter of acknowledgment, and requested the deponent to give it to her in the event of his death; and the Doctor afterwards, upon the defenders' mother returning to the room on that day, or on the occasion when the deponent got the codicil executed on the following day, repeated, in her presence, his request that the deponent should deliver the acknowledgment to her in the event of his death. That the precise words used by the Doctor the deponent cannot recollect; but they were to this effect, that, addressing the deponent, he said, 'You know you have a letter addressed to *May*,' meaning the defenders' mother, 'and you will give it to her after all is over with me.' Nothing passed in the presence of the defenders' mother intimating the nature or contents of the said letter. The Doctor was quite aware that he was dying."

On cross examination he stated, that he became acquainted with the pursuer long before he became acquainted with Dr. *Hamilton*, and the pursuer introduced the Doctor to the deponent: That from that time they met frequently, but no great friendship or intimacy subsisted between them: That shortly after the deponent's introduction the deponent called once or twice upon the Doctor, at his house in *Prince's-street*, where his sisters also lived: That he never was in any other house where the Doctor resided, except upon the occasions above deponed to, on his last illness: That prior to 1816, the deponent had acted as the pursuer's agent, and the Doctor certainly knew that the deponent was the pursuer's man of business: That *September* 1817, the date of the letter of acknowledgment, is the true date, or about it, of the interview with Dr. *Hamilton*, when the document was delivered to the deponent: That he cannot say whether his books

contain any entry relative to the bond of caution referred to, and he is sure there is none as to the letter of acknowledgment: That no one was present when the letter was deposited with the deponent, and the deponent was not aware that any other person was cognizant of the letter, except the deponent and the Doctor, and, as the deponent supposed, the defenders' mother herself; and the deponent's reason for this supposition was, that when he was stating to the Doctor his opinion that the acknowledgment would not avail, the Doctor remarked, that it would please and satisfy her: That the deponent considered the depositions of the letter, and all that passed about it, as confidential, and never mentioned it to any one: That when, on the Doctor's last illness, he, in the defenders' mother's presence, requested the deponent, when all was over with him, to deliver the acknowledgment to the defenders' mother, the Doctor said this aloud, with the apparent intention that it should be heard by the defenders' mother, and, as the deponent understood, in order that there might be an acknowledgment by the deponent in her presence, that he was possessed of the letter: That the deponent's impression certainly was, that the defenders' mother knew that a letter, declaring her to be the Doctor's wife, had been placed in the deponent's custody."

In a will made in 1820, Dr. *Hamilton* described the parties as "*Mary Hamilton* and *Janet Hamilton*, my daughters, and *May Clark* their mother;" and in a codicil made in 1823, a few days before his death, he called them "*May Clark*, and my four children by her, now in life."

The defenders, in order to show what had been Mr. *Dickie's* impression and his conduct at the time of the death of Dr. *Hamilton*, put in evidence a

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letter, dated the 11th of *March* 1823, and written by him to Mr. *Campbell* the army agent, announcing that event, and in which he thus expressed himself on the subject of Dr. *Hamilton's* family:—"Mr. *Bowie* has probably informed you that the late Mr. *Hamilton* has left a widow and four children; and as they have little else to depend on, his friends are desirous of obtaining the usual Government pension for them. It is proper to mention that Mr. *Hamilton* was not married according to the rites of the Church, but the lady holds a letter from him, written upwards of five years ago, declaring her to be his wife; since which, they have chiefly resided together, two of the children have been born, and she was considered in the neighbourhood by habit and repute as his wife; which, by our law, constitutes a legal marriage, entitling the widow and children to all their legal rights." Other letters of a similar import were given in evidence.

The Lord Ordinary, on the 27th of *February* 1839, pronounced an interlocutor in favour of the Appellant. The Respondents carried the case before the Judges of the First Division of the Court of Session, when their Lordships unanimously delivered a judgment by which they altered the interlocutor of the Lord Ordinary, and assoilzied the Respondents, with expenses.—This was the judgment appealed against.

The *Solicitor-general* and Mr. *S. Gordon* (Mr. *Bruce* was with them), for the Appellant:—The question here is, whether there has been a perfect act of marriage. In order to establish such an act there must have been mutual consent, and this consent must have been properly expressed by the one to the other at some time during the life of the parties. That was not so here, and the act done does not amount to

an act of marriage. Try it by this test: Suppose either of the parties had, after this act, married another person in a regular manner, would such marriage have amounted to bigamy? Or again, would what was done have enabled either of the parties to obtain from the Courts, in a hostile suit, a declarator of marriage during the life of the other party? It is submitted that both these questions must be answered in the negative. It is plain that Dr. *Hamilton* did not choose to do anything which would fix on him during his life the liabilities of marriage; his desire was merely to do that which would provide for this woman after his death. The scheme was a mere fraud on the public.—[*Lord Campbell*: It was not only a fraud on the public, but an injury to the pursuer; for the woman could not be considered a widow unless she had been a wife; and if so, his rights were thereby affected.—The *Lord Chancellor*: And whatever reserve there was in his mind, if what he did appeared to be an act of marriage, and was accepted by her as such, his mental reservation would make no difference in the matter.]—That is so, and that gives rise to the second ground of argument, namely, that she did not accept this as an act of marriage. There is no evidence that she knew of the paper having been written. There is no evidence that the paper was ever delivered to her. The case of *Fullarton v. Anderson* (*a*) is relied on as to this part of the case. It establishes the doctrine that written declarations of marriage found in the man's repositories, and never proved to have been communicated, are not sufficient to constitute marriage. It was there said that there must be an explicit act of acceptance on her part; for that while the letter remained in the man's custody, and without knowledge and accept-

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(*a*) Morr. 12690.

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ance by the woman, it was revocable by him, and was therefore not binding on either party.—[Lord *Campbell*: But if once a present marriage is constituted, it will make no difference that the paper remains in the man's custody.]—It is clear that there was no such constitution of marriage here; had there been he would have called her his wife in his will and codicil. It cannot be supposed that he would on his deathbed describe his children in the way in which illegitimate children are described, and their mother by her maiden name, had any valid act of marriage ever been constituted between them. The evidence here goes to show that, with a view to prevent its constituting a contract of marriage, the paper was not delivered to her. The Judges in the Court below spoke of this as a contrivance to cheat the woman, but it was not so.—[The *Lord Chancellor*: Part of the evidence is, that the Doctor said to *Dickie*, “At all events it cannot do harm; it will please and satisfy her.” Does that show an intention to cheat her? It tends to prove that she knew of the paper; how else could she be pleased and satisfied with it?—That depends upon the question whether it was to please and satisfy her as a contract of marriage, or as the means of getting a pension. It does not show that she knew of the paper at the time. There is no trace of any demand by her of an acknowledgment of marriage. Had there been any such thing and had he endeavoured to defraud her, that would have been a different thing; but there is none. There is no evidence here of the woman having seen the paper, nor of her having had even legal possession of it. *Dickie* was not the agent of the woman, but of the man; he was therefore not the custodier of the paper on her account, but on the account of Dr. *Hamilton*. Why was *Dickie* to keep the paper, and only to deliver it in the

event of the Doctor's death, if that paper was to be treated as having constituted a marriage ever since 1817? She was told of it at the time of the death; a fact which renders it probable that she did not know of it before. There was no marriage here. It is true that a marriage may be easily made in *Scotland*, but *M^cNeil v. Macgregor* (b) shows that, however easily it may be made there, it must be the result of the free, full, and deliberate consent of both parties; which certainly did not exist in this case.

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Mr. *Pemberton* and Mr. *Kelly*, for the Respondents:—This paper is itself a marriage, or, at the very least, evidence of a marriage made long before between these parties. All that was done is easily accountable by the fact of the poverty and pride of Dr. *Hamilton*. He desired to continue to mix with the society to which he had been accustomed: as a bachelor he could do so; as a married man he could not, for his means were not sufficient: he chose therefore to keep his marriage a secret, and he was the more impelled to do so as it might not have been agreeable to his relatives, who were better off in the world than himself, and from whom he had expectations. He married the woman, but would not let the marriage be made public. He desired to please and satisfy her by giving her this document; but having given it her, he deposited it with his agent to keep till his death. That agent was not the agent of the husband as contradistinguished from the wife; for when that paper was given, there ceased to be any difference of interest between them. *Dickie* was the agent of both parties for the purpose of the custody of that paper. The explicit assent of the woman may be proved as clearly by circumstances as by a declaration, and here the

(b) 1 Dow & Clark, 208.

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circumstances do prove it. After the date of the paper which was given to please and satisfy her, she lived with him as his wife, and all the neighbours believed them to be man and wife. Up to that time he had merely visited her, but at that time and thenceforward they lived together, and had the repute of man and wife. The assent may be inferred from circumstances, *Honeyman v. Campbell* (c). Lord Chancellor *Brougham* there says, "Consent alone makes the marriage; and there are three ways in which that consent may be proved. The first is consent in fact, *per verba de præsenti*; secondly, consent partly by the presumption of law and partly in fact, as when the parties live together as married, and are in habit and repute husband and wife." The rule thus stated is founded on the doctrine deduced by Lord *Stowell* from the *Scotch* authorities in *Dalrymple v. Dalrymple* (d), and stated in *Stair* (e) and *Erskine* (f). The man here had the strongest motives for concealing the marriage, but he had none whatever for not contracting it. Did he so contract it? There can be no doubt on the evidence that he did; that he wrote the letter, that he communicated it to the woman, and then deposited it with *Dickie*, for the double purpose of concealment and safety. That the woman must have known of the paper is clear; for otherwise where is the meaning to be attached to the phrase found in *Dickie's* evidence, that it would please and satisfy her? How could she be pleased and satisfied with a thing, of the existence of which she had no knowledge?—[Lord *Brougham*: It depends on the way in which it was known to her. If known to her, and she assented to it in the usual way, that is a marriage; but if known to her, and

(c) 2 Dow & Clark, 281.

(d) 2 Hagg. Cons. Rep. 58.

(e) Inst. lib. 1, tit. 4, s. 6.

(f) Bk. 1, tit. 6, s. 5.

she assented to it merely for the purpose of gaining a pension, that is not a marriage.]—It is impossible to conceive such an assent. The pension would not be gained without the marriage, and no one can doubt that, under the circumstances in which this woman was placed, the assent would be to the contract and not to the fraud; and the more so as the purpose of the supposed fraud would be defeated if the contract of marriage was not a valid one. There is every reason to believe that she knew of the paper, and that she assented to it as a contract of marriage, though, to gratify her husband and in the hope of gaining a benefit for her children, she consented to keep the marriage a secret from her husband's relations. The paper was then delivered to *Dickie* for safe custody, and perhaps also for the purpose of securing corroborative testimony; he must be considered her agent for these purposes.—[*Lord Campbell*: By the law of *Scotland*, a contract of this sort need not be delivered in the same manner as a deed must be in *England*.]—Then all the conditions are fulfilled which make this a valid marriage, and the judgment of the Court below must be affirmed.

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The *Solicitor-general*, in reply :—There is no sufficient evidence here of knowledge of the paper, and assent to it, by the woman. The whole case on her part depends on inference; and on inference alone this House will not, after the death of one of the parties, declare a marriage to have been constituted.

THE *Lord Chancellor* :—My Lords, this was an action brought by the pursuer, for the purpose of obtaining a declaration of the illegitimacy of the

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defenders, on the ground of their parents not having been married. The Lord Ordinary pronounced an interlocutor against the legitimacy, from which interlocutor there was an appeal to the Court of Session; and after argument, the Court of Session, by a unanimous judgment, reversed the decision of the Lord Ordinary. From that judgment of the Court of Session an appeal has been brought to your Lordships' House.

My Lords, there was one ground insisted upon on the part of the defenders, that has utterly failed; I mean the ground of defence resting upon habit and repute. The evidence of habit and repute was conflicting and divided to a great extent; and it is impossible, therefore, that evidence of that description could be made the foundation of a decision establishing the *status* of marriage. That part of the case standing by itself may be left out of our consideration.

The question, therefore, rests solely upon a document amounting to an acknowledgment of marriage; and the evidence, principally of Mr. *Dickie*, connected with that document.

The facts of the case, for the purpose of introducing that evidence, are very shortly these:—Dr. *Archibald Hamilton* had been a surgeon in the army. About the year 1814 he retired from the service. He was in very humble circumstances, and went to reside at *Edinburgh*. He lived for a considerable time with his sisters in that city. During that time he formed a connexion with a woman in an inferior condition of life, of the name of *May Clark*, who lived in the *Ganongate*, and by whom he had two children. Those children were avowedly illegitimate. He was obliged to give security to the district or the parish for their support.

But about the year 1817, in the month of *May* in that year, a considerable alteration took place in his position; in his mode of living. He left the residence of his sisters, and took a house, or apartments consisting of two or three rooms, in *Brown-street* in the *Pleasance*, and removed there. *May Clark* removed from the *Canongate*, with the children, and lived with him in *Brown-street*. He resided there for three years, and lived afterwards, I think, in the *Cross Causeway*, and subsequently to that in *St. Leonard's*, and in the year 1823 he died. From the time that he removed to *Brown street*, he constantly lived with *May Clark* and with the children, and subsequently to that removal he had two other children; two sons, twins; and the four are the defenders in this action, the Respondents in this appeal.

I have mentioned that, in the month of *May* 1817, he went to *Brown-street*, and he was accompanied, as I have stated, at this time by *May Clark* and the children. Very shortly after that period, he applied to Mr. *Dickie*, a writer to the signet, with whom he was in some way connected through his brother, the present pursuer, who had employed him in his profession. He applied to Mr. *Dickie* for the purpose of obtaining a writing by which *May Clark* should be secured a pension, as the widow of an army-surgeon, in the event of his death. Mr. *Dickie* informed him that that could not be done, unless he married her. To that he replied, that he never would do that. But, however, after a little time, he said to *Dickie*, "I wish you would draw me out the form of an acknowledgment of marriage between me and *May Clark*;" and he added, "it will please and satisfy her." Mr. *Dickie* accordingly drew out such a form of acknowledgment; and having obtained that, he took his leave.

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In about a week or fortnight afterwards he returned to Mr. *Dickie*, with an acknowledgment in his own handwriting, in these terms:—"To *May Clark*. *Edinburgh, September 26, 1817.* My dearest *May*,—I hereby solemnly declare that you are my lawful wife; though, for particular reasons, I wish our marriage to be kept private for the present. I am your affectionate husband, *Archibald Hamilton*." And it was addressed on the back to "*Mrs. A. Hamilton, Brown-street, Pleasance*." He delivered this to Mr. *Dickie*, requesting Mr. *Dickie* to take care of it; to show it to nobody; and to take care that, in the event of his (*Dickie's*) death, it should come into no person's possession but that of himself, Mr. *Hamilton*. Accordingly *Dickie* put this paper in an envelope, sealed it up, and endorsed it in these terms:—"To be delivered into the hands of *Archibald Hamilton, Esq.*, unopened." Mr. *Dickie* expressed an opinion that a secret transaction of this nature would not be sufficient to entitle the widow to the pension. To which Mr. *Hamilton* replied, "At all events, it can do no harm."

Now, stopping there for the present, the main question is this,—Was this paper shown to *May Clark*? It was written for the purpose of pleasing and satisfying her. The inference, therefore, from that declaration (and it must be remembered that Mr. *Dickie* is an unwilling witness on the part of the defenders), the inference from that declaration would be that it was shown to her. I think, looking at the style of the paper, and the terms of it, the strong probability is that it was shown to her. But I think the case does not rest there, with respect to its having been communicated to *May Clark*; because, upon the death-bed of Dr. *Hamilton*, Mr. *Dickie* attended to write his codicil; and upon that occasion *May Clark*,

the mother of the defenders being present, he said to Mr. *Dickie*, "You know you have a letter from me, addressed to *May Clark*. Upon my death, when all is over with me, you must deliver it to her." Mr. *Dickie* says, from the manner in which he expressed himself, he understood that Dr. *Hamilton* wished, in the presence of *May Clark*, to obtain from him an acknowledgment that he was still in possession of that paper. *May Clark* made no observation as to the letter, did not ask what it related to, or what the contents of it were. This leads, therefore, to the inference that she knew what the paper was, and that this was done to satisfy her at that period that this gentleman, Mr. *Dickie*, still continued in possession of that acknowledgment.

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Again, there is another circumstance that is material to be adverted to. After the death of Dr. *Hamilton*, Mr. *Dickie* attended at the funeral, and produced a settlement and a codicil, which was read in the presence of *May Clark* and some of the members of the family; and also produced this paper and read it. Mr. *Dickie* says he does not recollect that he read it; but Mr. *Harvey*, a writer to the signet, whose diary was produced, which diary according to the law of *Scotland* would be evidence, states that it was read. It does not appear that *May Clark* expressed any surprise, but received it as a circumstance that she was already acquainted with. Now, these circumstances lead me to the conclusion that the strong probability is that this paper was from the first communicated to *May Clark*. If it was communicated to her, and she assented to it, and she continued to cohabit with him to the time of his death, and had by him children, there can be no doubt that by the law of *Scotland* that would be a marriage.

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But then it is said (and that was one of the main arguments in the case), that this paper was never delivered; that it was never out of the possession of the party (Dr. *Hamilton*); that Mr. *Dickie* took it as his agent, and held it as his agent; that Mr. *Dickie*'s possession, therefore, was his possession, and that the instrument therefore was wholly inoperative. But if the paper was shown to Mrs. *Hamilton*, and she assented to it, and she afterwards cohabited with him upon the footing of that paper and upon the foundation of it, then she had an interest in that paper. Had it remained in the possession of Dr. *Hamilton*, and not been delivered to Mr. *Dickie*, he would have held it for himself and as trustee for her; and when it was handed over to Mr. *Dickie*, though he stood in the first instance as agent of Dr. *Hamilton*, he would, so far as the possession of this paper was concerned, have held it as agent for both of them; as agent for him and as trustee for her. Therefore I apprehend that if we come to the conclusion that this paper was communicated to her and she assented to it (and if it was communicated to her, no person, knowing the evidence, can for a moment doubt that she did assent to it), that, under these circumstances, would constitute a marriage. It is very material to consider in what light Mr. *Dickie* viewed the transaction immediately after the death of Dr. *Hamilton*. He wrote a letter on the subject of it to the present pursuer, and represented it as a legal binding marriage. That letter is not forthcoming. It is not produced among the documents, and we do not know therefore the precise terms of that letter; but we have the answer of the pursuer to the letter; we have two letters written after that letter was received, referring to it, and it is quite obvious from those letters that Mr. *Dickie* had

represented to the pursuer that the marriage was a legal binding marriage according to the law of *Scotland*. At a subsequent period, he being connected with the pursuer, seems to have altered his opinion, and has styled it a pretended marriage. But, taking all the circumstances of the case into consideration, I agree entirely with what was expressed so strongly by the Judges of the Court of Session, that his evidence, as far as it goes against the defenders, is to be received with great suspicion and caution ; for he not only, immediately after Dr. *Hamilton's* death, represented it to the pursuer to be a valid and binding marriage, but he represented it to be a valid and binding marriage to Mr. *Campbell*; for he wrote a letter to Mr. *Campbell* stating, in terms, that by the law of *Scotland* it was a legal and binding marriage, which entitled her to the widows' pension ; and that letter was written for the purpose of obtaining the widows' pension. I think that, taking all these circumstances into consideration, considering the relation in which Mr. *Dickie* stood to the pursuer, and, notwithstanding that relation, his having stated in his evidence that he had no doubt this letter was communicated to *May Clark*, we cannot but come to the same conclusion at which the Court of Session arrived, that the letter was communicated to her, and that she assented to it.

But it is stated in the printed papers that Dr. *Hamilton* was a proud man, a high-minded man, and that he never would have degraded himself by such a connexion. But at least this is true and certain, that he intended after his death that she should be represented as his widow. He intended after his death, therefore, that she should be considered as having been his wife; and therefore his pride was sufficiently satis-

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fied by concealing, during his lifetime, the circumstance of the marriage, and for that purpose he took precautions which seem to have been sufficiently effectual.

Again, the same witnesses who represent him as being a high-minded man, as being a proud man, and that he would not degrade himself by a connexion of this kind, state that he was an honourable man; and yet if we are to consider that this was not a marriage, that he was not married to *May Clark*, what is the inference? That he intended to commit a fraud by enabling her to represent herself as his widow, to represent that she had been married to him, in order that she might obtain a pension. How much easier is it to reconcile the different parts of this character by assuming, which is the probability and the strong probability of the case, that he married her, that it was his intention to keep that marriage secret because he knew it would bring them into conflict with his relations, and make him the subject of mockery to persons with whom he was connected during his lifetime, but that he had no scruple whatever that it should be avowed after his death that he had married her; and that by these means, these honest means, he would secure to his widow a pension. It appears to me that that is the true view of the case. That was the view of the case taken by the Court of Session, and it is the view that I have taken after a careful consideration of the paper and of the other evidence in the case.

There is one observation made by the Court of Session, which I think material; it is a circumstance to lead us not to view very favourably the course of conduct pursued by the present plaintiff. No proceedings were instituted for a period of twelve years after the death of *Dr. Hamilton*. During the whole

of that period the pursuer lay by and did not question the legitimacy. It is not a very favourable circumstance in support of his claim, and it was not very just to the defenders, because the effect of it might have been to deprive them of evidence most material for the purpose of supporting their defence. I think that, under all the circumstances, I shall be justified in advising your Lordships to confirm the unanimous decision of the Court of Session in this case, with costs.

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Lord *Brougham*:—My Lords, I entirely agree in the view which my noble and learned friend has taken of this case, in the arguments by which he has so clearly and satisfactorily supported that view, and in the proposition which he has made to your Lordships as the result of it, namely, to affirm the present judgment, with the costs of the appeal.

My Lords, habit and repute being, as my noble and learned friend has stated, and for the reasons he has assigned, entirely laid out of view in the case, the question really turns upon that paper which my noble and learned friend has read, the letter addressed by Dr. *Hamilton* to *May Clark*, in which, by present words, *per verba de presenti*, he acknowledges her as his wife. Though he gives that paper into the hands and into the custody of his agent Mr. *Dickie*, Mr. *Dickie* keeps it afterwards in the capacity which, I think, has been most justly stated, and proved indeed by my noble and learned friend, not merely as the agent of the bailor, the party giving him the document, Dr. *Hamilton*, but as in the nature of a trustee, if not agent, for *May Clark*, to whom the paper was addressed.

My Lords, it will not be safe for parties, though

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that is not the case here, but it will not be in any-wise safe for parties minded to practise a fraud upon the world, in *Scotland* at least, to hold themselves out as man and wife, much less to execute an instrument in which they are represented as taking one another as man and wife, and yet to say and to rely upon that assertion, and even to afford proof of it by acts done at the time, and declarations contemporaneously made, that they did not intend this as a real marriage, but only as a fraud upon the community by representing themselves as married persons for any purpose which they might have in view. I give no opinion as to what would be the law in that case, though I may have very little doubt about it. Suffice it to say that it would not be safe for parties to attempt any such thing, expecting thereby to release themselves from the matrimonial obligation. But that is not this case. The only question here is, did both parties concur; was this letter known to *May Clark*, and did she (for that is no doubt essential) in reality assent to the contract which this letter purports to make between her and Dr. *Hamilton*? For it is perfectly clear, I hold it to be past all doubt, in *Scotland* at least, that if a man says to a woman, "I take you for my wife," and she assents and says, "I take you for my husband," she really intending (the case I have already put is that of neither party intending marriage, but both concurring in a fraud), but she really intending to take him for her husband, though he may all the while only intend to deceive her or to deceive the world, or to practise a fraud for any purpose, it is past all doubt that, she receiving the proposition and really assenting to it, he shall not be heard to say that he did not mean it. He has contracted a marriage **with** her as completely as if he had

really intended to contract it, and not merely attempted to compass a fraud.

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But it is said that the only object was to obtain a pension for her by making her his widow, whom, during his life, he did not intend to make his wife. The answer to that is, that he could only make her his widow and give her those rights after his death by making her his wife; and then the question comes round again to this, did she receive this paper, and receiving it, did she give her sanction to it?

Now, my Lords, I take the evidence to be quite clear that she must have received this paper. In addition to the circumstances referred to by my noble and learned friend, which prove that, it is proved by what passed at the time, and is no matter of dispute; for when it was said, "If you do not mean it as a marriage it will have no effect," his answer was, "Never mind; it will please and satisfy her." How could it please and satisfy her, unless it was communicated to her? And whether it was communicated by actually putting the paper into her own hands that she might peruse it, or by reading it over in her presence, or, after having written it and given it to Mr. *Dickie* as a kind of common agent between them, by his holding it and communicating the contents to her, the declaration, at the time, that it would please and satisfy her, clearly shows that it was intended that in one way or other she should come to the knowledge of the contents. In either way the declaration of marriage was communicated to her, and the whole evidence in the case leaves it perfectly clear that she must have assented to it. Indeed, the presumption would be so strong that she would, in those circumstances, give her ready and immediate assent to it, that it would require strong proof to the contrary,

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strong proof of refusal and dissent, to make it possible to credit the assertion, if indeed that were made (I doubt its ever having been made), that if the knowledge of its contents, on her part, is admitted, either by delivery or by reading it to her, or by perusal of it, she did not at once assent to take him for her husband.

My Lords, a good deal of observation was made upon the evidence of Mr. *Dickie*. I do not approve of the conduct of that gentleman; much the reverse. I agree in much that was said respecting him in the Court below; but at least we are entitled to believe those parts of his statement which receive confirmation from the strong probabilities of the case, the circumstances of the parties, and other evidence existing in the cause; and I believe it so far as to credit what he says with respect to the knowledge intended to be conveyed to *May Clark*. But I also cannot lay out of mind the circumstance that he, being a man of business, a professional man, and knowing, as every person in the profession generally knows, what the *Scotch* marriage law is, treated it as a marriage for a certain time at least, and that he could not so have treated it unless the paper had come to the knowledge of *May Clark*, and by her been assented to. It clearly proves to me that he knew she had known of it, and that he likewise knew she had assented to it. Upon the whole, therefore, my Lords, I am of opinion that the judgment of the Court below is right; and that, in the terms of my noble and learned friend's proposition to your Lordships, that judgment should be affirmed, with the costs of the appeal.

Lord *Campbell*:—My Lords, I am entirely of the same opinion with my noble and learned friends who have preceded me. I have considered this case with

very great attention. To induce one to do that, it was not at all necessary to be told that a *Scotch* peerage was involved in the question. It was enough to consider that the legitimacy of the children and the *status* of a respectable woman, who had appeared in the world as the legitimate children and as the wife of Dr. *Hamilton* for twelve years, was to be decided by a judgment of your Lordships' House.

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Now, my Lords, the *onus* being upon the pursuer, I think that he has discharged himself of that in the first instance, by showing that, down to the year 1816, Dr. *Archibald Hamilton* and *May Clark* certainly lived together without being married, and that the two children who were then born were living with them. The *onus* is thus cast upon the defenders; but I think that they have effectually supported that *onus*.

They first relied upon habit and repute. I agree entirely that that cannot be justly relied upon. The marriage law of *Scotland* is so exceedingly well settled, that I need not remind your Lordships that habit and repute, to constitute a marriage, must be uniform; the acts of the spouses must all be consistent with the notion of their being man and wife. Now although, in one part of *Edinburgh*, Dr. and Mrs. *Hamilton* appeared to be married, in others they appeared to be in the situation of a mistress living with her maintainer.

But then, my Lords, when we come to the letter to which my noble and learned friends have referred, it seems to me that that affords satisfactory evidence of the marriage. I think that the fair inference from the examination of the witnesses is, that that was communicated to *May Clark* at the time when it was written; otherwise it would not have satisfied her, according to his intention. But, at all events, there

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is direct and positive evidence that it was communicated to her in the lifetime of Dr. *Hamilton*, during his last illness. She clearly assented to it, by living with him as she had previously done. She clearly assented at a time that the assent was necessary. Assent may be proved without actual cohabitation or consummation. It was decided, in the case of Mr. *Adam*, where there was a contract by *verba de presenti*, that consummation is not necessary, by the law of *Scotland*, to establish a marriage. But it is necessary in this case to show that there was an assent; and with that view, I apprehend that my noble and learned friend on the woolsack drew your Lordships' attention to this circumstance, that they had lived together, and had several children.

Then that being so, the *onus* is now transferred back to the pursuer. He must make out his case. Now how does he undertake to do that? If he could really have shown that this was a mere contrivance; that no use whatever was to be made of the letter till after Dr. *Hamilton* was dead; that they were not to live as man and wife during his lifetime; and that it was only to be used after his death for the purpose of obtaining a pension for this woman as his widow, and thereby committing a fraud upon the Government,—I humbly apprehend that that would not have amounted to a marriage contract. But, my Lords, how is this proved on the part of the pursuer? It must be proved; for if this paper was communicated to *May Clark*, the *onus* lies upon the pursuer to show that she was a party to the fraud: but of that there is not one tittle of evidence. Even supposing that Dr. *Hamilton's* object might have been to commit a fraud upon the public, and to obtain a pension for this woman with whom he had lived upon the footing that she was to be treated as his wife after his

death, without having been his wife during his life, yet *May Clark* was no party to that; and I apprehend that it would be indispensably necessary, in order to deprive her of her *status* of wife and to bastardise her issue, that it should be shown that she was cognizant of it, and that she consented to that fraud.

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There being no evidence whatever, my Lords, to implicate her in this alleged conspiracy, and it being satisfactorily proved to my mind that this paper was communicated to her in his life, and that she assented to it, I think that this paper constitutes a matrimonial contract.

My Lords, with respect to the circumstance which has been very much relied upon on the part of the Appellant, of this paper being in the custody of Mr. *Dickie*, the law agent of Dr. *Hamilton*, that does not seem to me to be entitled to the slightest weight; because, supposing it to have been *bonâ fide* written to constitute a marriage between the parties, and to have been communicated to her, and that she had assented to it, and this supposed scheme of a pretended marriage had never been entertained for one moment, what would have been the natural course of things? Why, that Mr. *Dickie*, the law agent of the husband, would have had the custody of this paper.

For these reasons, my Lords, I think that the Lord Ordinary came to an erroneous conclusion upon this subject; and I entirely concur in the interlocutor of the First Division of the Court of Session, establishing the validity of this marriage.

Interlocutor affirmed, with costs.



SAMUEL SHORE and Others - - - *Appellants.*

THE ATTORNEY-GENERAL, on the Rela- }
tion of THOMAS WILSON and Others - } *Respondents.*

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May 13, 14,
and 15.
June 24, 25,
and 28.
1842:
May 10.
August 5.

*Trusts for
Charities.
Protestant
Dissenters.
Unitarians.
Construction
of Deeds.
Extrinsic
Evidence.
Attorney-
general.*

By deeds, executed in 1704, Lady *Hewley* conveyed estates to trustees, upon trust to pay out of the rents such sums, yearly or otherwise, to such poor and godly preachers for the time being of *Christ's* holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of *Christ's* holy Gospel, as the trustees for the time being should think fit; and to dispose of such sums, and in such manner, for promoting the preaching of *Christ's* holy Gospel in such poor places as the trustees for the time being should think fit; and also to dispose of such sums as exhibitions for educating such young men designed for the ministry of *Christ's* holy Gospel as the trustees for the time being should approve and think fit; and to dispose of the remainder of the said rents in relieving such godly persons in distress, being fit objects of her and the trustees' charity, as the trustees for the time being should think fit: and she directed, that when any one of the trustees should die, the survivors should elect in his place such a person as they in their judgments and consciences should think fit to be a trustee.

By other deeds, executed in 1707, Lady *Hewley* conveyed other estates to the same trustees, partly for the support of poor old people in an almshouse, for the management of which she appointed other trustees; and after directing that the trustees and managers should observe the rules which she should leave for the selection and government of the poor people therein, she ordered the residue of the rents to be applied upon trusts, which were the same as those contained in the deeds of 1704. By the rules left by her for the selection of the old people for the almshouse, she ordered that none be admitted but such as should be poor and piously disposed, and of the Protestant religion; and able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and *Bowles's* Catechism.

At the dates of the deeds all religious sects tolerated by law believed in the Trinity; but in the course of time the estates became vested in trustees of whom the majority were Unitarians, and they applied the rents for the benefit of Unitarians; and that sect became tolerated by law.

Held by the Lords,—affirming judgments of the Court of Chancery, on an information filed in 1830,—that neither Unitarians nor members of the Church of *England*, but Protestant Dissenters

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only, are entitled to the benefit of the charities, and that all the trustees were properly removed, as all concurred in the misapplication of the charity funds.

Semble, that Unitarians, in the present state of the law, are capable of partaking of such charities, founded for their benefit.

HELD, that for the purpose of determining the objects of Lady *Hewley's* charity, under the terms "godly preachers of *Christ's* holy Gospel," "godly persons," and the other descriptions contained in her deeds, extrinsic evidence is admissible to show the existence of a religious party by whom that phraseology was used, and the manner in which it was used, and that she was a member of that party. (*See the opinions of the Judges, infra, pp. 499-578.*)

Semble, that in putting a construction on the deed of 1704, the provisions of the deed of 1707 are not to be referred to.

A decree declaring, in the terms of the prayer of a charity information, that certain persons are not entitled thereto, is not defective for not also declaring who are entitled.

The Attorney-general may appear as counsel for defendants to an information filed by relators in his name.

THE suit in which this appeal arose was instituted by an information filed in 1830, in the name of the Attorney-general, for the purpose of administering certain charities founded in the years 1704 and 1707, by Dame *Sarah Hewley*, by distinct sets of deeds, and placed under the direction of distinct sets of trustees. The questions for decision in the appeal turned upon the construction of the foundation deeds, and on the admissibility of certain evidence given to show the intentions of the foundress.

Trust-deeds
of 1704.

By the first set of deeds, dated the 12th and 13th of *January* 1704, Lady *Hewley*—therein described as relict and executrix of Sir *J. Hewley*, late of *Gray's-Inn*, in the county of *Middlesex*, knight, and daughter, heir, and administratrix of *Robert Woolrych*, also late of *Gray's-Inn* aforesaid, Esq.—conveyed various estates in *Yorkshire* to *Richard Stretton*, *Nathaniel Gould*, *Thomas Marriott*, *John Bridges*, *Thomas Nesbitt*, *Thomas Colton*, and *James Wyndlow*, their heirs and assigns, upon trust that they should, after Lady *Hew-*

ley's decease, pay an annuity and other charges, therein mentioned, out of the rents, and should from time to time, out of the residuary rents, issues, and profits, "as well pay and dispose of such sums of money, yearly or otherwise, to such and so many poor and godly preachers, for the time being, of *Christ's* holy Gospel, and to such poor and godly widows, for the time being, of poor and godly preachers of *Christ's* holy Gospel, at such time and times, and for so long time or times, and according to such distributions, as the said trustees and managers for the time being, or any four or more of them, shall think fit; and employ and dispose of such sums of money, and in such manner, for the encouraging or promoting of the preaching of *Christ's* holy Gospel in such poor places as the said trustees and managers for the time being, or any four or more of them, shall think fit; as also employ and dispose of such sums of money, yearly or otherwise, as and for exhibitions, for such or so long time or times, for or towards educating of such young men designed for the ministry of *Christ's* holy Gospel, never exceeding five such young men at one and the same time, as the said trustees and managers for the time being, or any four or more of them, shall approve and think fit: And, as to all the surplus and remainder of the aforesaid clear and residuary rents, issues, and profits, &c., that the said trustees shall, from time to time, employ and dispose of the same in and for the relieving of such godly persons in distress, being fit objects of the said Dame *Sarah Hewley's* and the trustees' and managers' charity, as the said trustees and managers for the time being, or any four or more of them, shall think fit."

Then followed a proviso and declaration that the said trustees and managers for the time being should,

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in their dispositions and distributions of the aforesaid charities, have a primary and chief respect to such objects thereof as were or should be in *York, Yorkshire*, or other northern counties in *England*, not excluding those in other places and counties, as the trustees and managers for the time being, or any four or more of them, from time to time should think fit; and also that whatsoever charitable dispositions or allowances by Lady *Hewley* should have been made to persons or places in *York* or *Yorkshire*, immediately or shortly before her death, should be continued and paid out of the said residuary rents and profits by the said trustees and managers for the time being, until they, or four of them at least, should see just reason to discontinue, alter, or determine the same, or any of them respectively.

And it was, among other things, further declared that the said trustees and managers should annually elect one of themselves to be treasurer of the rents and profits of the trust estates, and should annually audit his accounts; and also, "that from time to time, as and when any one of the trustees for the time being shall happen to die, the survivors of them shall and may elect, in the room of every such deceasing trustee, such a person as they in their judgments and consciences shall think fit and approve of, who shall be a manager of the said trust estates, together and equally with them the surviving trustees, and have equally with them the same authority, benefit, and power respecting the trusts thereby declared; and, in case of the death of any such elected manager, to elect in like manner in his room another like manager; and that the election of every such manager for the time being shall be entered and registered in some or one of the books to be so provided and kept,"

as therein mentioned; “and that, after such time as two or three, at the most, of the said trustees shall have departed this life, the survivors of them shall and may add to themselves, as co-trustees with them, all and every the manager and managers so elected as aforesaid, to make up the number of trustees completely seven in the whole;” and the surviving trustees should thereupon, by the advice of counsel, convey all their said trust estate to the persons who, for the time being, shall be such elected managers, or to some other person or persons, to the intent that such person or persons should convey the same to, or to the use of the surviving trustees and the elected managers, so as to complete the number of seven trustees: And Lady *Hewley* reserved to herself power, by deed or will, to revoke all or any of the said trusts, charities, or orders, and to declare new trusts, charities, or orders, concerning the said trust estates and premises, or any of them.

By the second set of deeds, dated the 25th and 26th of *April* 1707, and consisting, like the first set, of lease and release, and assignment and declaration of trust, Lady *Hewley* conveyed, to the same persons that were trustees of the deeds of *January* 1704, a new-erected house, messuage, or building, used for a hospital or almshouse for poor people, with other hereditaments in the city and county of *York*, upon trust, after her decease, to permit the almshouse to be for ever used and enjoyed as a hospital or habitation for poor people, in such manner as the same then was, or at the time of her death should be, used and enjoyed, but subject to such orders, regulations, powers, provisoes, and appointments, as were thereafter referred to; and upon trust, after her death, that the trustees and managers for the time being should, out

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of the rents and profits of the residue of the premises, defray the expense of repairing the premises and providing catechisms for the inmates of the hospital for the time being, and certain other charges: And upon further trust, that the trustees and managers for the time being, after the death of Lady *Hewley*, should, out of the rents and profits of the residue of the premises, raise yearly for ever the clear sum of 60*l.*, for the maintenance of such poor people as Lady *Hewley*, during her life, had or should place, or which the trustees and managers for the time being should from time to time place in the hospital, in such proportions, at such times, and to such uses and purposes as Lady *Hewley* had appointed, or at any time during her life should appoint, in writing under her hand, or in any book or collection of rules or orders which then were or thereafter should be made by her for the better ordering, choosing, and government of the poor in the almshouse; and more particularly, that the trustees and managers for the time being should from time to time, after her death, fill up and place to the number of ten poor persons, qualified according to such collection of rules and orders, in such hospital or almshouse, whereof nine should be always poor widows or unmarried women, so long as they should continue such, each being of the age of 50 years or upwards; the tenth person to be a sober, discreet, and pious poor man, who might be fit to pray daily twice a day (viz. every morning and evening) with the rest of the poor in the almshouse, if such a man could conveniently be found; and in default thereof, the tenth to be a poor woman qualified as the other nine; and also that the trustees and managers for the time being should pay to each of the said ten poor persons 10*s.* upon the first day of every month: And upon further

trust, that from time to time, as and when any one of the trustees for the time being should die, Lady *Hewley* during her life, and after her death, and in default of her nomination and election, the survivors of the trustees, should elect in the room of every such deceasing trustee such person of reputation as they in their judgments and consciences should think fit, who should be a manager of the trust estates together and equally with them, and should have the same authority and powers respecting the trusts thereby declared; (this clause was the same as that in the deed of 1704, for keeping up the complete number of seven trustees): And upon further trust, that they the trustees and managers for the time being should, at all times after the death of Lady *Hewley*, observe the rules, orders and directions, and trusts therein, and in the book of rules, orders and directions subscribed by Lady *Hewley*, contained; and that the trustees and managers for the time being should, after the death of Lady *Hewley*, be the only special visitors and governors of the almshouse or hospital, and of all the poor persons therein; and that they should have the sole power from time to time to govern, order, admit into, or expel from the almshouse, all such poor persons as then were or thereafter should be admitted into the same; yet pursuant always to the rules, orders, &c. in the said book contained: And upon further trust, that if any of the trustees should be interrupted or disturbed in their visitation, rule or government of the almshouse, or of the poor people therein, by or by reason of any civil or ecclesiastical, or other lawful power or authority whatsoever, then, and so long as such disturbance or interruption should continue, the trustees and managers should employ the said 60 *l.* to such other pious uses

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as Lady *Hewley* should appoint by writing as therein mentioned ; and in default of such appointment, then to employ the same to such or the like charitable uses as were thereafter expressed.

The residue of the rents was then directed to be applied upon trusts for "poor and godly preachers," &c., which were repetitions of the trusts of the deeds of *January* 1704, but there was no reference to those deeds.

By an indorsement on one of the deeds of *April* 1707, and dated the 10th of *May* 1709, Lady *Hewley* declared that the management of the said *Hospital*, as to the putting in the poor upon any vacancy, should be in the power of the within-named *Thomas Colton*, and also of *Timothy Hodgson*, *Mathew Baycock*, *Samuel Smith*, *Robert Rhodes*, *Martin Hotham*, and *William Hotham*, all of the city of *York*, and such as should be chosen to succeed any of them when they should die ; and that the grand trustees should, at the beginning of every year, leave the monies in their hands for paying the monthly allowances for the year ensuing, and pay what would be necessary for repairs, &c.

The collection of rules and orders appointed by Lady *Hewley*—and referred to in the last-stated deeds—"to be kept and observed as well by the feoffees or trustees of the revenues of the said newly-erected hospital, &c., for the better government and ordering of the same, and also by the said poor persons placed or to be placed in the same," contained the following orders and directions (among others not material to be here stated) :—

"Let none of evil fame or report be admitted into the hospital, but such as are poor and piously disposed, and of the Protestant religion.

“Let every almsbody be one that can repeat by heart the Lord’s Prayer, the Creed, and Ten Commandments, and Mr. *Edward Bowles*’ Catechism.

“Let all the almspeople, when not disabled by weakness, duly repair to some religious assembly of the Protestant religion, every Lord’s-day, forenoon and afternoon, and at other opportunities, to attend the ordinances of God.

“Let every almsbody, morning and evening, in private devotion, commend themselves to God in prayer, and in their prayer remember their foundress, *Sarah, Lady Hewley*, while she lives, and after her death pray for her trustees.”

Lady Hewley died in *August 1710*, having in her will appointed *Dr. Colton*, one of the said trustees, her executor.

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The information, which was filed at the relation of certain members of the sect called Independents, against all the trustees (a) of both charities, alleged, amongst other things, that *Lady Hewley* and all the original trustees of the estates, and the managers of the hospital, were believers in the doctrines of the Trinity, original sin, and the atonement; that they were Nonconformists and Dissenters from the Estab-

The
Information.

(a) The information was filed in *June 1830*, and amended in *December 1831*. The relators were, *Thomas Wilson, Joseph Read, George Hadfield, John Clapham*, and *Joseph Hodgson*, who are the Respondents in the appeal. The defendants (the survivors of whom are now Appellants) were, *Samuel Shore* (since deceased), *Offley Shore, John Pemberton Heywood* (since deceased), *Peter Heywood, Thomas Walker, Daniel Gaskell*, and *John Wood*; (these are called the grand trustees, being the successors of those named in the deed of 1704); the *Rev. Charles Wellbeloved*, the *Rev. John Kenrick, Thomas Bischoff, Varley Bealby* (since deceased), *John Henry Oates*, and *George Palmes*; (called the sub-trustees, being the successors of those named in the deed of 1707.) The five last named were made defendants by the amendment in 1831.

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lished Church, and in religious belief were Calvinists and Trinitarians, within the protection of the Act of Toleration, 1 *William & Mary*, c. 18; that in the course of time, and contrary to the design of the charity and the intentions of the foundress, the estates became vested in trustees the majority of whom, though calling themselves Presbyterians, professed Unitarian opinions, rejecting, as unscriptural, the doctrines of the Trinity, the divinity of *Christ*, original sin, and the atonement; and that for some years past, a considerable portion of the rents had been applied by them in the education of Unitarian ministers, and for the benefit of other persons of that denomination.

And the information prayed (amongst other things) a declaration that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, were not fit objects of Lady *Hewley's* charities; that exhibitions to colleges or schools, where Unitarian belief or doctrine was taught, were not fit exhibitions for promoting the education of ministers of *Christ's* holy Gospel, within the intent of Lady *Hewley's* charities; that the allowance of a salary of 80 l. to Mr. *Wellbeloved*, as the preacher of *St. Saviour-Gate* Chapel, in *York*, was an unfit allowance or distribution of the charity funds, by reason of his not being a "godly preacher of *Christ's* holy Gospel," within the intent and meaning of Lady *Hewley's* charities, and that such allowance be discontinued: That all the objects of Lady *Hewley's* charities might be decreed fairly and in such manner to participate in the charity funds as she meant and intended; and that it might be declared that such

dissenters alone as were commonly called Orthodox Dissenters, and as would have been within the protection of the Act of Toleration of the 1st *W. & M.* c. 18, at the time of the foundation of the charities, and would not have been subject to the penalties of the Act 9 & 10 *Will.* 3, c. 32, against blasphemy, could be considered as coming within the intent and meaning of Lady *Hewley*, and as entitled to participate in the benefit of her charities; and that the defendants, the trustees and managers of the charities, or such of them as the Court should think fit, might be removed, and that other trustees and managers might be appointed in their place.

The information also prayed an injunction to restrain the trustees from proceeding to elect new trustees or managers of the charities, and for a receiver; and that directions might be given for securing the charity estates and funds, and to provide for the better administration thereof for the future.

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All the defendants put in their answers, some jointly and some separately. The Rev. Mr. *Well-beloved*, answering separately, stated that he believed it to be true, as alleged in the information, that the chapel in *St. Saviour-Gate* in *York* was principally built at Lady *Hewley's* expense, and that she belonged to the congregation frequenting the same: that Dr. *Colton* and Mr. *Hotham* (two of the trustees named in the deeds) were the first preachers at that chapel, and continued to officiate as such preachers till long after Lady *Hewley's* death: that they and she were Dissenters from the Established Church, and were Nonconformists, holding the doctrines common amongst Presbyterians of that period, but what these doctrines were in particular he could not

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set forth; and he also believed it to be true, that on Lady *Hewley's* death, Dr. *Colton* preached her funeral sermon; and he admitted that on the death of the Rev. *Newcome Cappe* in 1799, he himself was elected to succeed him as sole preacher at the said chapel; and that he had 263 *l.* a year, as the theological tutor and principal of the college called *Manchester College*, in *York*, which was, he said, an establishment supported by Presbyterian Dissenters for educating ministers of that denomination; and that he, as preacher at said chapel, received from the funds of this charity 60 *l.* a year, from Mr. *Cappe's* death to 1808, when the stipend was increased to 80 *l.* a year; a sum which, considering the change in the value of money compared with the necessities of life, was not more than 60 *l.* in the time of Mr. *Cappe*, or than 40 *l.* which Lady *Hewley* herself allowed Dr. *Colton*.

To this answer, and also to the answers of the other defendants, which were much to the same effect, exceptions were taken by the relators, on the ground, among others, that the defendants had not answered whether they were Unitarians in their religious belief and doctrine, and what the peculiar doctrines of Unitarians were.

The exceptions were argued before the Vice-Chancellor, whose decision allowing them, was, on appeal in *December* 1831, confirmed by Lord *Brougham*, then Lord Chancellor.

Mr. *Wellbeloved*, in answering the exceptions, after stating that few persons agreed in the definition of the term "Unitarian," said that he "uniformly represents himself and desires to be considered as a Protestant Dissenter of the Presbyterian denomination, and as one who firmly believes in the Divine mission of *Jesus Christ*, and holds no other doctrines than

those contained in *Christ's* holy Gospel, to all which he yields a full and cordial assent. However, he admits that, in the sense in which he himself uses the term 'Unitarian,' and which is hereinafter set forth, he is a Unitarian in religious belief and doctrine: That in using the term Unitarian, as applicable to himself, he means more especially to denote that he professes and believes the following Christian doctrines:—That to know God to be the true God, and *Jesus* the *Christ* whom he hath sent, is eternal life: that it is defendant's duty to worship God according to the precepts and the example of his Divine Lord and Master, who taught his disciples to pray to God their Father in Heaven, and to ask of him what they needed, in his name: that it is his duty to ascribe glory to the only wise God through *Jesus Christ*: that he acknowledges *Jesus* to be the Word that in the beginning was with God, and rejoices in the doctrine of the Evangelist, that God so loved the world that he sent forth his only-begotten Son into the world, not to condemn the world, but that the world through him might be saved: that he believes that God, having sent him forth, was with him; that the works which he did, and the words which he spake, were not his own, but the words of the Father who sent him, and whose will he came to do: that he believes that *Jesus Christ* was, as he said of himself, a man who spoke the truth he heard from God, and as God commanded and instructed him, so he spoke. That defendant believes, according to the words of the Apostle *Peter*, that *Jesus* of *Nazareth* was a man approved of God by miracles and wonders and signs, that God did by him; that having been crucified and slain, God raised him from the dead and made him Lord and *Christ*; that then he was

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glorified by God. That in conformity with the doctrine of the inspired Apostle *Paul*, defendant acknowledges and believes in one God, the Father, of whom are all things, and one Lord, *Jesus Christ*, by whom are all things, and we by him: that there is one God, and one Mediator between God and men, the man *Christ Jesus*, by whom God hath reconciled us to himself; who was made sin for us that we might be made the righteousness of God in him; who gave himself for us that he might redeem us from all iniquity, and purify unto himself a peculiar people, zealous of good works. That defendant acknowledges *Christ* as the image of the invisible God, the first-born of every creature, in whom it pleased the Father all fulness should dwell; who was made a little lower than the angels, but for the suffering of death was crowned with glory and honour, that by the grace of God he should taste death for every man; that he was made in all things like unto his brethren, in all points tempted like them, yet without sin; and whom, having become obedient unto death, God highly exalted, giving to him a name above every name, that at the name of *Jesus* every knee should bow, and every tongue confess that *Jesus Christ* is Lord, to the glory of God the Father. That defendant believes that the purpose and grace of God were made manifest by the appearing of *Jesus Christ*, who hath abolished death and brought life and immortality to light through the Gospel: that in the day when God shall judge the secrets of men by *Jesus Christ*, he will render to every man according to his deeds. That to the before-mentioned doctrines of *Christ* and his Apostles, defendant gives his unqualified assent; and that whatever is taught in *Christ's* holy Gospel concerning the existence, perfection, and government of

God, the person and the office of *Christ*, the terms of pardon and acceptance with God, the duties of life and a future state of righteous retribution, defendant gratefully and cordially receives and professes as Divine truth."

And in this answer, Mr. *Wellbeloved* stated that he did not preach at *St. Saviour-Gate* Chapel the received doctrines of any particular sect, but those only which he, after a diligent study of the Gospel, conscientiously believed to be the pure doctrines of Christianity; but he admitted that he preached doctrines in accordance with those above set forth by him in illustration of the sense of the term Unitarian as used by him.

And as to *Manchester* College, he said it was an establishment chiefly supported by Protestant Dissenters of the Presbyterian denomination, for supplying the churches of that denomination with a succession of ministers, but not for the purpose of instruction in any peculiar doctrine of any sect: that the principle on which that institution is conducted is, that every student in it shall be left to the free exercise of his own private judgment in matters of religion: that as theological tutor he most scrupulously adhered to that principle, imparting to his pupils such instruction only as would qualify them to interpret the Scriptures for themselves, excite in them a love of truth and a habit of searching the Scriptures.

It appeared from the further answers of the other defendants, as to their religious belief and doctrines, that all of them—except the Messrs. *Heywood* and Mr. *J. Wood*, who were not charged in the information to be Unitarians, and except Mr. *Palmes*, who was a member of the Church of *England*—were Unitarians in the sense of that term as explained by Mr. *Wellbeloved*, and that he and Mr. *Kenrick* and Mr. *Offley*

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Shore were members of the *British* and *Foreign* Unitarian Association: it also appeared that the rents and profits of the charity estates were 2,900 *l.* a year, and that the Apostles' Creed and *Bowles'* Catechism had not been used in the almshouse for many years.

Evidence. The relators went into evidence in support of the allegations and charges in the information:—

And first—in order to show that *Lady Hewley* and the original trustees of the charities, and *Mr. Bowles*, whose Catechism she desired to be used in the almshouse, were Trinitarian Dissenters, believing in the divinity of the person of *Jesus Christ*, and in the doctrines of original sin and the atonement, as commonly received,—they proved and put in evidence extracts from the wills of *Sir John* and *Lady Hewley* and of *Dr. Colton* (b), and the whole of *Bowles'* Catechism (c); and for the same purpose they examined

(b) Those extracts are contained in the Vice-Chancellor's judgment, *infra*, p. 375.

(c) This Catechism contains, amongst other Questions and Answers supported by texts of Scripture, the following:—

“ Q. In what condition is the posterity of our first parents born?
 —A. In a sinful and miserable condition.—[Rom. v. 17, 18, 19, and iii. 23.]

“ Q. Wast thou born in that condition?—A. Yes, I was conceived in sin, and am by nature a child of wrath as well as others.—[Psalm li. 5. Ephes. ii. 3.]

“ Q. Hath thy life been better than thy birth?—A. No; I have added sin to sin, and made myself above measure sinful.—[Rom. iii. 10. Col. i. 21.]

“ Q. What if thou shouldest die in the condition thou wast born and bred in?—A. I should perish everlastingly.—[John iii. 3. 2 Thess. i. 8.]

“ Q. Is there no way to get out of this sinful and miserable estate?
 —A. Yes.—[2 Tim. i. 9, 10.]

“ Q. Is it to be done by any power or righteousness of thy own?
 —A. No; but God in his rich mercy hath appointed a way.—[Titus iii. 4, 5.]

“ Q. What way hath God appointed?—A. Only by *Jesus Christ*.
 —[John xiv. 6. Acts iv. 2.]

several learned ministers, chiefly of their own religious denomination (Independents), who formed their opinions on those points from reading the controversial and other tracts of that period. The same witnesses were also examined as to the meaning of the terms "godly preachers," "godly persons," "Presbyterian,"

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"Q. What is Jesus Christ?—A. The Son of God manifest in the flesh.—[Gal. iv. 4. 1 Tim. iii. 16.]

"Q. What hath Jesus Christ done for man?—A. He hath laid down his life for our redemption.—[Matt. xx. 28. Col. i. 14.]

"Q. What further benefit have we by him?—A. Life and salvation.—[John vi. 27. 48. Heb. v. 9.]

"Q. Shall all men partake of this redemption and salvation?—A. No, there are many who perish notwithstanding.—[Matt. vii. 13, 14. Phil. iii. 18, 19.]

"Q. By what means may a sinner obtain a part in this redemption?—A. By faith in Christ.—[Eph. ii. 8. John iii. 16.]

"Q. What is it to believe?—A. To rely on Jesus Christ, and him alone, for pardon and salvation, according to the Gospel.—[John iii. 36. Acts xvi. 31. Isaiah l. 10. John v. 44.]

"Q. Why hath God appointed faith to this excellent use?—A. Because faith gives him what he looks for, the whole glory of our salvation.—[Ephes. ii. 8, 9.]

"Q. How is faith wrought in the soul?—A. By the Word and Spirit of God.—[Rom. x. 14, 17. 2 Cor. iii. 6. John xvi. 9, 10.]

"Q. What call you the Word of God?—A. The Holy Scriptures, the Old and New Testament.—[2 Tim. iii. 16.]

"Q. In what order doth God work faith by the Word?—A. First he shows men their sins, and then their Saviour.—[Acts ii. 37. John xvi. 9.]

"Q. Why doth he observe this order?—A. That Christ may be the more precious to the soul.—[1 Peter ii. 7. Luke vii. 47.]

"Q. How doth faith work love?—A. It lays hold upon the infinite love of Christ, and works a mutual love in us.—[1 John iv. 19. Luke vii. 47.]

"Q. Are not the Ten Commandments the Commandments of Christ?—A. Yes; they are a special part of God's Word, which is a rule of life.—[Psalm xix. 7. Matt. v. 17.]

"Q. What are the Sacraments which Christ hath left to his Church?—A. Two; Baptism, and the Supper of the Lord.

"Q. What is Baptism?—A. It is dipping or sprinkling with water, in the name of the Father, of the Son, and of the Holy Ghost.—[Matt. xxviii. 19. Acts x. 47.]

"Q. What is the nature of this Sacrament?—A. It represents, and (through faith) seals the sprinkling of the blood of Christ, and the washing of the Holy Ghost.—[Acts xxii. 16. Tit. iii. 5. Acts viii. 37. 1 Peter iii. 21.]"

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“Presbyterian congregation,” “Independent congregationalists,” and “Baptist,” at the time of the foundation of the charities; and as to the sense in which the term “Presbyterian” is at this day used by Unitarians as applicable to themselves; and which term, those witnesses said, did not describe the religion of Unitarians, but their places of worship, which formerly belonged to Presbyterians, and are now employed for Unitarian worship.

Secondly,—in order to show that the Rev. Mr. *Wellbeloved*, the Rev. Mr. *Kenrick*, and others of the defendants, were Unitarians, and that the Unitarians are an established class of Dissenters from the Established Church, and that they hold peculiar doctrines differing from other denominations of Dissenters,—the relators put in evidence sermons printed and published by the said Rev. defendants, and some of the annual printed reports of, and books and tracts circulated by, the British and Foreign Unitarian Association, of which those and others of the defendants were members; and for the same purpose they examined several witnesses, some of them being Unitarians, but most of them Independents.

And thirdly, to prove the misapplication of the charity funds, the relators examined the same witnesses, and put in several reports of the *Manchester* College, at *York*, to show that that establishment was fit for educating Unitarian ministers only, was supported by several of the defendants, Mr. *Wellbeloved* and Mr. *Kenrick* being the chief professors, and received from the charity funds annual exhibitions of 20*l.* or more to each of six students educated there, instead of being employed, as Lady *Hewley* directed, towards the education of young men designed for the ministry of *Christ's* holy Gospel: and they also proved payments of an annual allowance of 80*l.* out of the

charity funds to Mr. *Wellbeloved*, as minister of *St. Saviour-Gate* Chapel; of 12*l.* to the minister of a Unitarian chapel at *Rossendale*, in *Lancashire*, and other sums to other ministers of various chapels which were formerly Presbyterian and Trinitarian, but recently used solely for Unitarian worship. It appeared from a list given in by the grand trustees, that out of 237 persons receiving aid from the charity funds at the time when the information was filed, 38 were by reputation Unitarians in doctrinal opinions, and most of them preached in old Presbyterian chapels, the ministers of which always received aid from the charity.

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The cause was heard by the Vice-Chancellor in *December* 1833: objections were taken to many parts of the evidence, but it was allowed to be read, on the understanding that the Court would treat as the speech of counsel so much of it as was inadmissible: and at the conclusion of the argument, his Honor delivered his judgment, and made a decree, whereby he declared That ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations; and that persons of what is commonly called Unitarian belief and doctrine, are not fit objects of, and are not entitled to partake of the charities of Dame *Sarah Hewley*: And the relators having by their counsel made an offer to allow the defendant *J. P. Heywood* to remain a trustee of the charities, and that defendant not having by his counsel accepted such offer, the Court ordered and decreed that the said defendant and all the other defendants be removed from being trustees and sub-trustees or managers, respectively, of the charities; and that it be referred to the Master to appoint proper persons to be trustees and sub-trustees or managers

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thereof, respectively, in the room of the said defendants:
 And that it be referred to the Master to take an account of the rents and profits of the charity estates, and of the funds thereto belonging, received by the defendants since the 25th of *March* 1830; and in taking the accounts, the Master was not to disallow or disturb the distribution made of the rents and profits by the defendants in or about the month of *May* 1830: And also that it be referred to the Master to tax all parties their costs of the suit up to this time, as between solicitor and client; and to inquire whether the relators and defendants had properly incurred any, and what charges and expenses in the cause beyond the costs thereof; and if he should find that they had, to take an account thereof, and tax the same accordingly: And that it be referred to the Master to settle a scheme for the application of the residue of the accumulated funds of the charity, after providing for the payment of the said costs, charges, and expenses of all parties, and the subsequent costs of the suit.

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The following is the substance of his Honor's judgment:—
 “Before stating my opinion upon the trust, I must first of all say, that I should be extremely sorry if any person entertained an opinion that I thought harshly of the Unitarians as a body; because it has happened to me to have had intercourse with various persons, from the earliest part of my life, and whom I have known for many years, who are of that persuasion, and with whom I have lived with great cordiality and friendship; but it does not appear to me that the question in this case to be determined is, whether they were properly called Christians or not, but whether it was consistent with what appeared on the trust-deeds of *Lady Hewley*,—having regard to such evidence as had been produced of what her sentiments were,—that the Unitarians could be allowed to participate in the benefit of her charity; she having stated, that the first trust was for “poor and godly preachers, for the time being, of *Christ's* holy Gospel;” and

then repeating phrases, which evidently showed that she alluded to the same sort of persons who might happen to be widows of persons, or exhibitioners, and so on, as would fall under the first denomination.

The will of Sir *J. Hewley* has been put in, which commenced with the following words:—"This is the last will and testament of Sir *J. Hewley*, who being, of God's mercy, of perfect memory," and so on, "first committing my spirit to God who gave it, hoping to find mercy to me a sinner, and to be saved only by the merits and mediation of *Jesus Christ*, my alone Saviour and Redeemer." I must here remark the manner in which the will was witnessed:—"Witness my hand and seal, 24th of *June*, in the year of our Lord God 1682;" and therefore I consider that the will testified, from the beginning to the end, his belief in the divinity of the Redeemer.

I must now refer to the words of the will of Lady *Hewley*:—"I, Dame *Sarah Hewley*, widow, having first committed my immortal soul into the hands of my Redeemer, to be washed in his blood, and made meet to be partaker with the saints," &c.; she then proceeded to make her will. The natural inference from this will is, that she not only believed in the divinity of the Redeemer, but looked for salvation through his merits, in that sense in which the Church of *England* understood that he was the Redeemer,—“that he had paid the price,” and that for the price which he had paid, God would be pleased to forgive the sins of all that turned unto him.

The next document is the will of Dr. *Colton*: he also had used similar phrases:—"I commit my immortal soul into the hands of Almighty God, my Creator, and which I beseech him mercifully to look upon, not as it is in itself, polluted with sin, but as it is redeemed and purged with the precious blood of his only beloved Son, and my most sweet Saviour *Jesus Christ*, in confidence of whose merits and mediation alone it is that I cast myself upon the mercy of God, for the pardon of my sins and the hope of eternal life." He, it was to be remarked, was one of Lady *Hewley*'s trustees, and was the person that preached at *St. Saviour's Chapel*, where she attended during her life, and he preached her funeral sermon.

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Then, looking at the words of the deed, I am necessarily driven (inasmuch as the rules were directed by the deed of 1707 to be observed) to a consideration of *Bowles's* Catechism, which, according to the rules, the poor almspeople were directed to repeat: and for the purpose of determining the question before me, I am bound, not merely to consider the questions and answers in the Catechism, but also the texts in the margin, which are manifestly referred to in support of the answers. One question was,—“What was the sin of our first parents?—Eating the forbidden fruit. What was the fruit of that eating?—It filled the world with sin and sorrow. In what condition is the posterity of our first parents born?—In a sinful and miserable condition.” That last answer comprehended all the posterity of *Adam*. “Wast thou born in that condition?—Yes, I was conceived in sin, and am by nature a child of wrath, as well as others. What is *Jesus Christ*?—The Son of God manifest in the flesh.” Now, that answer referred to that very singular verse at the end of the third chapter of *St. Paul's* (first) Epistle to *Timothy*, which, according to the translation of the Scriptures used at that time, could not leave a doubt in the mind of any person as to the divinity of the Redeemer, because, according to the received translation, it was put in this way:—“And without controversy, great is the mystery of godliness; God was manifested in the flesh, justified in the spirit, seen of angels, preached unto the Gentiles, believed on in the world, received up into glory.” Now, no man could doubt that this text was intended to convey the only conclusion that could be formed, which was, that not merely the office and mission of our Saviour were divine, as stated in the answers of the defendants, but that his person was divine.

The Catechism then went on in another part,—“In what order doth God work faith by the word?—First, he shows men their sins, and then their Saviour. Why doth he observe this order?—That *Christ* may be the more precious to the soul. How doth faith work love?—It lays hold upon the infinite love of *Christ*, and works a mutual love in us.” Now, that expression, “the infinite love of *Christ*,” of necessity conveyed the notion that he was divine, for none but a divine being could have infinite love. Persons might appeal to their

own common reading and observations of what passed every day, and I appeal to the testimony given before the Committee of the Lords and Commons upon the state of *Ireland*, for proof of this proposition; that the Presbyterians do hold that the only effectual view of religion, for the purpose of softening the hearts of men and turning them to God, is the view of the Father's love in sending his Son to appear upon earth and suffer as a man. That was the very view which was taken by a pious Presbyterian minister, who was examined with regard to the *Regium Donum* at *Belfast*.

Now, the first donation in Lady *Hewley's* trust was to "poor and godly preachers of *Christ's* holy Gospel." I cannot but suppose, as she was not a Conformist, that she did mean those persons, not being members of the Church of *England*, who did entertain, among others, the firmest belief in the divinity of our Redeemer's person, in the necessity of the sacrifice he made, because of the universality of sin, commonly called original sin; and that she would, as Sir *Edward Sugden* has stated with great propriety, have shaken with horror at the notion of her charity being given to the sustenance of persons who not only disbelieved these two doctrines, but who actually preached against them. It has also been argued (and I must say I do not remember a case which has been argued with more ingenuity and ability by all the members of the bar concerned in it) that the principal object of this lady was to support poor ministers, widows of poor ministers, and the other persons included in her trust-deed, who would themselves be the supporters of what was called the great doctrine of the Presbyterians,—that sort of unrestrained method of disseminating the faith which would not submit to be bound by any test or creed, or by anything except the words of Scripture.

Now, the book mentioned in the Catalogue of Books at the end of the Sixth Report of the Unitarian Society, which was called an Improved Version of the New Testament, affords a strong inference that persons who would assist the publication of it cannot come under the description of "poor and godly preachers of *Christ's* holy Gospel," even according to the view which has been taken of those words by the defendants' counsel. Surely it is immaterial whether a Creed is expressed

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in a form of words, or whether a thing called a translation is propounded to mankind which refuses to give the literal sense of words, and in lieu of words expressing the literal sense of the words in the original text, substitutes other words. Where the literal meaning of a word was doubtful, translators might place one word in the text of the translation and another in the margin, in order that a choice might be made; and many cases may be imagined in which the idiom of the *English* language would not permit the literal rendering of word for word from the *Greek* or the *Hebrew*; but where persons have obviously and systematically gone out of the plain way, and have chosen not to give the literal meaning, but to give an assumed and arbitrary meaning, for the purpose of misleading the ignorant reader, those persons must be considered as in effect imposing a Creed upon the reader, and not giving him the benefit of judging for himself by means of the pure word of Scripture. I make this observation in consequence of the translation given in that book, of the first chapter of the Epistle of *Paul* to the *Hebrews*; for it appears most clearly, that the persons who composed the translation did not intend, when they made what they called a translation, to render that first chapter literally, but did intend to impose a Creed. A comparison of the text in *Griesbach* with the new version would make this plain.

[His Honor then entered on a critical examination of the 1st, 2d, 3d, 5th, 6th, 7th, 8th, and 14th verses of the first chapter of the Epistle to the *Hebrews*, in the "Improved Version" (12mo. edition of 1809), and compared it with the corresponding verses of the *Greek* text of *Griesbach* (the 8vo. *London* edition of 1819), referring also to the authorised *English* version. After expressing his astonishment that any person could have ventured to call that an "improved version" of the Scriptures, which rendered the words δι οὗ (2d verse), "for whom;" ἀπαύγασμα τῆς δόξης, καὶ χαρακτήρ τῆς ὑποστάσεως αὐτοῦ (3d verse), "a ray of his brightness and an image of his perfections;" Τῷ ῥήματι τῆς δυνάμεως αὐτοῦ (same verse), "by his powerful word;" γεγέννηκά σε (5th verse), "I have adopted thee;" and πυρὸς φλόγα (7th verse), "flames of lightning;" his Honor said it was perfectly plain that, in those and other passages which he examined, the gentlemen who had fabri-

cated this Unitarian Testament, though they gave themselves the character of extreme accuracy, never meant to give a translation, but, meaning to fetter the understanding of the reader, they wilfully altered some words and interpolated others, and imposed their Creed in the shape of a translation. His Honor then proceeded :]—

I have taken this as a specimen of the whole ; I have looked at a variety of passages, and I do not remember to have seen any translation which could be considered more unsatisfactory, more arbitrary, more fanciful, and, I am sorry to say, more false, than this thing called by the Unitarians an improved version ; and sure am I that Lady *Hewley* would have thought it the worst calamity that could have happened to her that persons should be considered entitled to participate in her charity, professing to call themselves “ godly preachers of *Christ’s* holy Gospel,” who would give their sanction to the publication of such a work as that. For the reasons I have assigned, she would, if the matter had been duly explained to her, have seen that it militated against that principle which the defendants’ counsel said was the principle on which she desired her charity to be administered—namely, the principle of free discussion, without creed, and by appealing only to the Scriptures as they stood.

There is a vast number of other passages ; but it is perfectly useless to go through them. One remark, however, may be made upon the criticism of the new translators. They print in *italics* the latter part of the first and the whole of the second chapter of *St. Matthew*, and the whole of the second chapter and all the first chapter of *St. Luke*, except the four first introductory verses ; and this they do, as they tell us in the notes, in pp. 2 and 111, because those chapters and parts of chapters are to be considered as of doubtful authority, though they are to be found in all the manuscripts and versions which are now extant. In the progress of improvement, it may be discovered that no parts of Scripture are genuine and authentic, except the first verse of *Genesis* and the last of *Revelation* ; and, according to the argument for the defendants, the preachers upon those two verses only might still be considered as godly preachers for the time being of *Christ’s* holy Gospel, within the intent and meaning

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of Lady *Hewley's* trust-deeds. I find, by the evidence, that Mr. *Wellbeloved* and Mr. *Kenrick*, and some third trustee (*Offley Shore*), were subscribers to the institution called the Unitarian Society, which enumerated amongst the books it circulated this "Improved Version" of the Scriptures, as it was called; and my opinion is, that, the question being, not who should participate, but what given individuals should be excluded, it is satisfactorily made out that no person who believes as Mr. *Wellbeloved* has stated in his sermon he believes, or who acts as Mr. *Wellbeloved* has acted with regard to supporting that Unitarian Society which had published such a book as the improved version, could be considered as entitled to share in the charity of Lady *Hewley*.

Therefore I think it clear that no stipend ought to be continued to Mr. *Wellbeloved*, or to any person preaching the doctrines he does; and it is also clear that the charity itself cannot be administered according to the intention of Lady *Hewley*, at least there is no reasonable security that it can be administered according to her intention, if it is allowed to remain in the hands of persons who thought as he did, and who had acted as he had. I have no evidence whatever to induce me to believe that he had anything to do with the improved version, more than in assisting by his subscription the publication of it, nor have I ever heard, nor have I the slightest conception, who were the fabricators of the book; but I am quite certain Lady *Hewley* never would have thought this book did contain *Christ's* holy Gospel, or that the persons who disseminated this book were to be considered disseminators of *Christ's* holy Gospel. Therefore my decree must, in substance, declare, that no persons who deny the divinity of our Saviour's person, and who deny the doctrine of original sin, as it is generally understood, are entitled to participate in Lady *Hewley's* charity; and that the first set of trustees must be removed.

It is sufficiently manifest that this lady never intended that there should be trustees of one sort to administer the dealing out of the funds amongst the persons who were named in the first deed, and trustees of a second sort to superintend the hospital which contained the poor almswomen. I therefore think that all the trustees who are Dissenters and deny the doctrine

of our Saviour's divine person, and the doctrine of original sin, must be removed; and though there is no objection personally to Mr. *Palmes*, yet as it appears that he is a member of the Church of *England*, he ought not to be continued a trustee.

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An appeal from the Vice-Chancellor's decree was argued for four days before Lord Chancellor *Brougham*, assisted by Mr. Justice *Littleale* and Mr. Baron *Parke*, in *June* 1834; but the further hearing being then adjourned, his Lordship resigned the great seal before he had heard the whole of the arguments (e).

The appeal came to be argued *de novo* before Lord Chancellor *Lyndhurst*, assisted by Mr. Justice *Patteson* and Mr. Baron *Alderson*, in *February* and *April* 1835; and although the arguments had not been concluded when his Lordship left office, yet, the parties having by their solicitors previously agreed to receive his Lordship's judgment after he should resign, and to give it the same effect, and no further, as it would have if delivered while in office; his Lordship, at *Gray's-Inn* Hall, on the 5th of *February* 1836, after hearing the opinion of the learned Judges, pronounced his judgment, concurring with them, affirming the Vice-Chancellor's decree, and dismissing the appeal, without costs.

The joint opinion of the learned Judges was delivered by—

Mr. Baron *Alderson* :—My Lord, my brother *Patteson* and myself having fully considered this case, in which your Lordship has desired to have our assistance, and having entirely concurred in our view of it, it becomes my duty to deliver our joint opinion, together with the reasons by which we think it may be supported.

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(e) The trustees offered to take his Lordship's judgment after his resignation, but the relators refused, as their leading counsel's reply had not been heard.

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This question arises out of certain deeds of endowment executed by Lady *Hewley*.—[The learned Judge, after stating the material parts of the deeds of 1704 and 1707, and reading the collection of rules, referred to in the latter, for the government of the almshouse, proceeded :]—Now it is contended, on behalf of the relators, that this charity is to be confined to Protestant Dissenters entertaining a belief in the divinity of our Lord *Jesus Christ*, in the atonement, and in the doctrine of original sin; in fact, to those who are commonly called Orthodox Dissenters, in order to distinguish them from others who entertain different opinions as to these important matters, and who are called in common parlance (though undoubtedly by no very accurate description in that respect) Unitarian Dissenters. In more correct language, perhaps, they should be called Believers in the Unity of the Godhead without any distinction of persons therein. For we presume that those who differ with them in this respect equally believe in the unity of the Godhead, although they think (and that from what they consider plain texts of Scripture) that such mysterious unity is not inconsistent with the equally mysterious distinction of persons therein.

If this question at all depended on any investigation of the comparative truth and excellence of these doctrines, or upon a critical examination of texts of Scripture (the only test to be applied by Protestants in such inquiries), we should feel that this was not a proper tribunal, and that we were not sufficient for these things. But this case really turns upon a question of fact. If the Unitarian doctrines are consistent with the intention of Lady *Hewley*, the decision of the Vice-Chancellor is erroneous. If they are inconsistent with it, the declaration he has made seems to us correct. The Vice-Chancellor's declaration, in substance, is, that no persons who deny the divinity of our Saviour's person, and who deny the doctrine of original sin, as it is generally understood, are entitled to participate in this charity.

There is no doubt as to the principles which are to govern our opinion; they are fully laid down and explained in *The Attorney-general v. Pearson* (*f*), and may be thus shortly

(*f*) 3 Meriv. 353.

expressed :—the will of the founder is to be observed. Then how is the will of the founder to be ascertained ? If it be expressed clearly in the instrument of foundation, there can be no difficulty. If expressed in doubtful or general words, recourse must be had to extrinsic circumstances, such as the known opinions of the founder, the existing state of the law, the contemporaneous usage, or the like.

Upon these principles, then, we proceed to consider the case. We may begin by laying the Church of *England* out of the question : for although Lord *Eldon* says (g) that a bequest for the worship of God would, *primâ facie*, be one to the Established Church, yet it is quite clear from all the documents in this case, that this foundation was in favour of some class or classes of persons dissenting from the Church. This point has not been disputed: But then this question arises, Who are the Dissenters whom Lady *Hewley* intended to benefit ? The provision is fourfold : 1st, in favour of poor and godly preachers, for the time being, of *Christ's* holy Gospel ; 2dly, in favour of poor and godly widows, for the time being, of poor and godly preachers of *Christ's* holy Gospel ; 3dly, for the distribution of sums of money to encourage and promote the preaching in poor places of *Christ's* holy Gospel, and for the education of young men designed for the ministry of *Christ's* holy Gospel ; and, lastly, for the relief of such godly persons in distress as were fit objects of her charity.

It is clear from this, that this pious lady had directly in view the encouragement of the preaching of the Gospel by Protestant Dissenters, and that in three ways : 1st, by provision to preachers and to their widows ; 2dly, by direct gifts of money for building places of worship, or endowing them when built in places not otherwise able to support a minister ; 3dly, for the education of youth for the same godly purpose. These three objects have plainly in view the propagation of some doctrines which she deemed to be of importance to the souls of men ; and her fourth object was in complete accordance with the three others, being in truth the relief of the professors of the same doctrines, in case, from their narrow

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circumstances or unforeseen calamities, they should be reduced to pecuniary distress. What, then, were the doctrines in question? *Primâ facie*, these would surely be the doctrines which she herself conscientiously entertained, and there is no reasonable doubt what those doctrines must have been. But she has more particularly described in her second deed, and in the rules she herself formed, one class, viz. the poor pious widows whom she deemed to be fit objects of her bounty in the almshouse which she had built. They must be persons piously disposed and of the Protestant religion; they must be able to repeat, by heart, the Lord's Prayer, the Creed and Ten Commandments, and Mr. *Edward Bowles's* Catechism; and they must weekly attend (unless sick) some place of Protestant worship.

To what class or classes of persons does this description extend? In the first place, it is expressly confined to Protestant Dissenters. In the second place, it seems clearly not confined to one class of Protestant Dissenters alone, because the widows are only required to attend *some place* of such Protestant worship. But, in the third place, it seems also as clearly intended to include those persons alone, who, though in many respects differing in opinion, yet agreed in some points which, probably, Lady *Hewley* thought fundamental; and we know from history that if it was her opinion, she was by no means singular in it. What, then, were the fundamental points? We think they must be taken to be those doctrines which are to be found in the Lord's Prayer, the Creed, the Ten Commandments, and *Bowles's* Catechism.

It has been argued that the only qualification required is, the being able to repeat those by heart; but we cannot think so meanly of Lady *Hewley's* understanding as to adopt that argument: we think she meant that they should accept these, and the doctrines therein contained, as a rule of faith, and that they should have them by heart, in order that they might be more deeply impressed with them,—precisely in the same way and for the same purpose as the godfathers, in the baptismal service of the Church of *England*, are required to cause the child to learn to say (which means to say by heart) the Creed, the Lord's Prayer, and the Ten Commandments, and to be further instructed in the Church Catechism: and as, in

the Rubric, the children are required to be brought for confirmation to the Bishop, as soon as they can do this and have attained a fit age, no one can believe that these provisions were intended to try their memory, and not to prove their faith.

Then what are the doctrines to be found in these documents? We may lay aside the Lord's Prayer and the Ten Commandments, being matters about which all Protestants are, we believe, agreed; at any rate, all the parties to this suit understand and assent to them in the same sense. Perhaps this may not be the case as to the Apostles' Creed, which, though certainly general in its language, has been usually confined as a creed to churches which did not doubt the divinity of our Saviour *Jesus Christ*. It is, as we have seen, one of the tests necessary for baptism and confirmation in the Church of *England*, and certainly is in that church, by its Catechism, explained in a Trinitarian sense; as plainly appears if we consult the Prayer Book; for the child there answers that he understands by it, 1st, a belief in God the Father, the Creator of all things; 2dly, in God the Son, the Redeemer of all mankind; and 3dly, in God the Holy Ghost, the sanctifier of all the elect people of God. Indeed, it is not improbable that Mr. *Baxter* took the same view of the doctrines contained in the Apostles' Creed; for when, on one remarkable occasion, he proposed that subscription to the Creed, the Lord's Prayer, and the Ten Commandments, should be alone sufficient as a test for church communion, it was objected that these might be subscribed by a Papist or a Socinian, he says, so much the better; but adds, "But if they were afraid of communion with Papists and Socinians, it should not be by making a new test or rule of faith which they will not subscribe to, but by calling them to account whenever, in preaching or writing, they contradict or abuse the truth to which they have subscribed." It would seem, therefore, that he thought that the preaching or writing some of the Papist or Socinian doctrines would be contrary to the truth of these articles, if they subscribed them: he must, we think, have referred to the Second Commandment as to the Papists, and to this Creed as to the Socinians; for there does not appear to be anything else in his proposed test to which this observation could at all even plausibly apply.

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And this view of the Apostles' Creed confirms, and is confirmed by, the last document, Mr. *Bowles's* Catechism. Now it is stated by all the witnesses, amongst whom are some very distinguished divines of various persuasions, and who all agree in this, that this catechism is essentially Trinitarian, and that it can be assented to properly by those alone who admit original sin and the atonement made for it, and acknowledge the proper divinity of our Lord and Saviour *Jesus Christ*. This would be quite sufficient, for there is no evidence on the other side, and we are to decide on the evidence. But on reading this catechism ourselves, with that attention it requires, and considering it, we cannot doubt that if we were required to form an opinion on it, we should decide that the witnesses have taken a correct view of it. It does appear to us clear that these are the doctrines fairly to be deduced from it, particularly by comparing it with the passages of Scripture quoted in its margin. We would rather, however, put this point of the case on the general tenor of the whole catechism and the uncontradicted evidence, than on our own view as to particular passages in it, lest we should fall into an error on some controverted question of criticism or theology, which are always delicate and dangerous subjects for unprofessional divines to handle.

Upon the whole, then, we think that in the description which, by her own rules, Lady *Hewley* has given of the widows who were to be inmates of her almshouse, those only were meant to be included by whom the doctrines enumerated in the Vice-Chancellor's declaration were accepted as a rule of faith. Now we think it reasonable to conclude that these widows who were to be the inmates of the almshouse are part of the fourth class, described in the deed of 1704 as "godly persons in distress." They are not only subjected in the deed of 1707 to the discretion of the trustees, being objects out of that class selected by Lady *Hewley* herself, but their description affords us the means of ascertaining, upon Lady *Hewley's* own authority, what she meant by the word "godly" in both the deeds. If this be so, then the same expression which is applied to the preachers and their widows ought to receive the same construction, it being plainly incongruous to give in one deed two meanings to the same expression. But indepen-

dently of this, at all events, the qualification attached by Lady *Hewley* to the admission of the inmates of her almshouse distinctly shows what her own opinions were, and how anxious she was for their adoption by others: and then that anxiety would apply with far greater force to the adoption of those opinions by preachers whose duty it was to take active steps for the propagation of the doctrines they professed. For an error there, would probably lead to evils of a much more extensive nature. It is not likely that a lady, who wished to regulate the opinions even of the poor widows, the objects of her pecuniary bounty, could intend to permit her funds to be devoted to the active propagation of any other than the same fundamental doctrines. It is quite inconceivable that she could thus (if with reverence we may use the emphatic language of Holy Writ on this subject) have strained at a gnat and swallowed a camel.

We think, therefore, that Lady *Hewley*, by poor and godly preachers, meant preachers professing the doctrines contained in the Vice-Chancellor's declaration. Again, if this be so, and if this be the class of persons whom she designates as poor and godly preachers of *Christ's* holy Gospel, it is most rational then to consider the other bequests for the encouragement and preaching of *Christ's* holy Gospel, and for the educating of young ministers of that Gospel, as confined to the preaching of persons professing these same doctrines, and to the education of youths for the ministry in places where those doctrines are professed.

This view of the case appears to us to be much confirmed by the peculiar language of Lady *Hewley's* will, by that of her pastor, Dr. *Colton*, by the state of the law at that period, and by the general tenor of history, both as to the doctrines usually professed by the great body of Dissenters at that time, and their non-interference with that particular provision in the Toleration Act, applicable to Unitarian preaching.

We were much pressed with quotations from various authors on this point, by the learned and ingenious gentlemen who argued for the defendants; but they have failed to satisfy us even as to the probability of any such Catholic intention as that, for which they contend, having been entertained by Lady *Hewley*. Such a view may perhaps have been

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taken by a few speculative divines of great benevolence of feeling, but was never very generally received. It is indeed observable, that almost all the very men, who held such opinions, constantly asserted their own orthodoxy of belief on the points now in question, and that in no instance whatever, that we remember, are they found to approve of the preaching, or inculcating by the teaching of youth, those doctrines now contended for and openly avowed by the Unitarian Dissenters in their discourses from the pulpit. The greater part, if not the whole, of those quotations seem to us applicable rather to the terms of church communion than to the present subject. For the question now is upon a charity to be devoted to the active propagation of doctrines by pecuniary encouragement given to their professors; and is not, whether, without any particular test, it may be allowed to persons differing on material points to waive them, and, notwithstanding, to associate in one religious community together. We do not, indeed, think such a plan wise or likely to succeed in producing peace in the churches; but we do not doubt that it has often been entertained by speculative men, who have not, perhaps, attended sufficiently to the results of practical experience in human life.

But this argument as to a supposed Catholic intention, seems inconsistent also with the probabilities of this case. Lady *Hewley* must have had fixed religious opinions, conscientiously and strongly felt by her, or else it is not likely that she would have made this foundation. It is very unusual for religious foundations to be made by any other than persons having strong and fixed religious opinions themselves. Those who entertain what are called latitudinarian notions on such subjects, are not commonly those who leave their property in this way. But waiving this, it seems to us clear that Lady *Hewley*, by requiring the Apostles' Creed, or indeed any definite Creed at all, as a necessary qualification in the case, has given herself a decisive answer to this argument, and has negatived the probability of her at least having ever entertained this supposed Catholic intention, by which, looking forward into futurity, she is imagined to have contemplated a continual movement in advance of religion, in the course of which all her own peculiar doctrines should, with others,

gradually be absorbed and lost in the light and splendour of what is called increasing knowledge and reason; for the very object and peculiar advantage of a Creed is, to prevent this perpetual fluctuation, and to fix religious opinions by bringing them continually to a definite test.

We have adverted to this part of the case, not as considering it a very important topic; but as it formed the principal ground of the argument before us, we thought it not right altogether to pass it over. Upon the whole, our opinion is that the declaration of the Vice-Chancellor is right.

There is another part of the case, which relates to the course your Lordship, as a Judge in Equity, ought to pursue, as to retaining or removing the trustees, in case your Lordship's opinion should agree with and confirm that which we have now delivered. That will depend, of course, on the point whether your Lordship is satisfied that these trustees do in fact profess opinions differing from those, to the promotion of which Lady *Hewley* devoted her foundations; and whether, in that case, it is the duty of a Court of Equity to remove them from a trust which they cannot so properly discharge as persons whose opinions concur with those of the foundress. But these are points on which it does not become us to offer any opinion to your Lordship.

Lord *Lyndhurst* :—This case was originally argued before my late predecessor in the office of Chancellor, in the presence of two of the learned Judges. Circumstances to which it is not necessary that I should particularly advert, prevented that noble and learned Judge from pronouncing any decision upon it. I regret that the parties were deprived of the benefit of his judgment. The case was afterwards argued before me with the assistance of the learned Judges who are now present. It was argued with great ability and learning, and everything was brought to bear upon the subject that could properly be urged for the purpose of leading the Court to a correct conclusion upon it. I certainly could have wished that I had not been called upon to pronounce judgment upon such a subject. But the parties on both sides have expressed their wish that we should decide it, and I have felt it my duty to comply with that request.

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It must be satisfactory to those who are interested in the case, that upon this occasion I have had the assistance and advice of the learned Judges now present, so much distinguished for their intelligence, ability, and learning. It is highly satisfactory to me, not so much because I consider that there is great difficulty in the case, as on account of its importance to the parties who are interested in it, and, I may add also, on account of its importance to the public.

I agree entirely in the principle, stated by the learned Judges, upon which this case must be decided. In every case of charity, whether the object of the charity be directed to religious purposes or to purposes purely civil, it is the duty of the Court to give effect to the intent of the founder, provided this can be done without infringing any known rule of law. It is a principle that is uniformly acted upon in Courts of Equity. If, as they have stated, the terms of the deed of foundation be clear and precise in the language, and clear and precise in the application, the course of the Court is free from difficulty. If, on the other hand, the terms which are made use of are obscure, doubtful or equivocal, either in themselves or in the application of them, it then becomes the duty of the Court to ascertain by evidence, as well as it is able, what was the intent of the founder of the charity, in what sense the particular expressions were used. It is a question of evidence, and that evidence will vary with the circumstances of each particular case; it is a question of fact to be determined, and the moment the fact is known and ascertained, then the application of the principle is clear and easy.

It can scarcely be necessary to cite authorities in support of these principles; they are founded in common sense and common justice; but if it were necessary to refer to any authority, I might refer to the case which has been already mentioned, the case of *The Attorney-general v. Pearson* (*h*), and to another case which was cited at the bar, the case in the House of Lords, *Craigdallie v. Aikman* (*i*). Throughout those judgments, the principles which have been stated were acknowledged and acted upon by a noble and learned Judge,

(*h*) 3 Meriv. 353.

(*i*) 1 Dow, 1.

of more experience in Courts of Equity and in questions of this nature than any other living person. I look upon it, then, that these principles are clear and established—that they admit of no doubt whatever.

What, then, were the objects and the purposes of this charity? We look at the deed of foundation of 1704, and we find from it that the object was to assist poor and godly preachers of *Christ's* holy Gospel; to assist poor and godly widows of the same description of persons; to promote and encourage the preaching of *Christ's* holy Gospel in poor districts and places; to assist in the education of young persons intended for the ministry of *Christ's* holy Gospel; to assist poor and godly persons in distress. The deed of 1707 provides for the maintenance of ten poor persons in almshouses that were founded by Lady *Hewley*. The rest of the property is directed to be applied to the same objects as are mentioned in the original deed of 1704. This is the substance of the provisions of the two deeds; and the first question that arises, and essentially almost the only question, is this, whom did the foundress of this charity mean to designate by poor and godly preachers of *Christ's* holy Gospel? And what were the principles and doctrines of which she intended to encourage and promote the preaching? It may be said, that the expression "poor and godly preachers" is clear and precise; but it is admitted as well on the part of the relators as on the part of the defendants, that it does not include ministers of the Established Church. However poor, however godly, however pious, by the admission of the parties they are excluded, and rightly. It appears, therefore, that the terms, poor and godly preachers, are to be taken with some limitations and restrictions; and the question therefore is, what are the proper limitations and restrictions in this instance?

The first question then for consideration, in order to lead us to a correct conclusion upon this point, is as to the particular religious opinions of Lady *Hewley*, the foundress of this charity. There can be no doubt that she was in her religious faith and opinions a Presbyterian. It is a matter of history that she was so. It is admitted by the answer of Mr. *Well-beloved*, and others of the defendants. It is proved by the evidence in the cause, by the evidence of those learned and

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respectable witnesses to whom the learned Judge has referred. It is not contested by any contradictory evidence. It is proved that she attended the chapel which she herself, I believe, built, and in part endowed—*St. Saviour-Gate* Chapel—and which is admitted to have been a Presbyterian chapel. Dr. *Colton*, the preacher at that chapel, was an acknowledged Presbyterian; he was her religious adviser; he was the executor to her will; he preached her funeral sermon: all these circumstances lead to the conclusion that she was in her opinions a Presbyterian.

This being so, then, the next question is, what were the doctrines and opinions of the Presbyterians at that time? Upon this also I think no reasonable doubt can be entertained. The Presbyterians objected only to those Articles of the Established Church that related to matters of discipline and church government. They did not object to any of the doctrinal Articles of the Church of *England*. It is stated by the witnesses, and there is no contradictory evidence, that the Presbyterians of that day were believers in the Trinity and in the doctrine of original sin, as contained in the Articles of the Church of *England*. If we go further we find the same points, to a degree at least, admitted in the answers of Mr. *Wellbeloved* and others of the defendants. Very many, they say, of the Presbyterians of that day, believed in the doctrine of the Trinity. The admission is qualified by the term “very many,” which admits of an extensive latitude of construction; but coupling this with the evidence, I am justified, I think, in coming to the conclusion that the great body of the Presbyterians were in their opinions Trinitarians.

But that which appears to me to be decisive upon the subject is a document which was referred to in the course of the argument, namely, the Heads of Agreement that were entered into between the Presbyterians and the Independents, in the year 1691. In the 8th section of those Heads of Agreement, intituled “Of a Confession of Faith,” they say that they hold either the doctrinal part of those commonly called the Articles of the Church of *England*, or the Confession or Catechism, shorter or larger, compiled by the Assembly at *Westminster*, or the Confession agreed on at the *Savoy*, to be agreeable to their rule of faith and practice. That document,

therefore, appears to me to be decisive upon the question, because the particular articles to which they refer, namely, the Articles of the Church of *England*, the Confession, the Shorter and Larger Catechism, and the Confession agreed on at the *Savoy*, all contain, expressly and distinctly, Trinitarian doctrines.

If it were necessary to go further into this case for the purpose of showing what were the opinions of the Presbyterians at that time, I might refer to the Act of Toleration. It is well known that the Dissenters were consulted in framing that Act, and that they were satisfied generally with its provisions. But we find in the 17th section that no person is allowed to preach, or is relieved from the penalties of former Acts of Parliament in preaching, unless he subscribes the Articles of the Church of *England*, with the exception of the 34th, 35th, 36th, and part of the 20th, which do not relate to doctrinal matters, but relate merely to church government and matters of that description.

The whole of this evidence leads me to the conclusion, about which I think no reasonable doubt can be entertained, that the great body of the Presbyterians as well as the Independents of that day,—the commencement of the 18th century,—believed in the doctrine of the Trinity and in the doctrine of original sin, which is contained in the Articles of the Church of *England* and other documents to which I have referred. Was Lady *Hewley*, then, an exception to this general rule, as to belief with reference to the doctrine of the Trinity and with respect to the doctrine of original sin? It appears to me, when we have established that she herself was a Presbyterian, and that the general doctrines of Presbyterianism were such as I have stated, that it is incumbent upon those, who contend that she was an exception to the general belief, to give evidence for the purpose of establishing that fact; that the burden of proof is upon those who make that assertion or that suggestion. But, waiving this, what are the probabilities of the case? It is well known that the principles of Unitarianism were at first very coldly received, and were listened to with aversion, and even with disgust, more particularly among the laity. Lady *Hewley*, at the time to which I am referring, was a person advanced in life. Is it

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probable, then, that she should have adopted these opinions, and upon points which, in one of the documents before me, are stated, I think by Mr. *Kenrick*, to have been considered by all churches essential?

There is another consideration that presents itself, arising out of the situation and character of Lady *Hewley*. She had attracted much attention. She was a person of great piety, of a certain rank, of great and unbounded charity. It must have been known, it would indeed have become a matter of notoriety, if she had entertained these opinions. It must have come down to us as a matter of history, had she entertained Unitarian opinions, in the same manner as in the case of *Firmin*, a person who resembled her in the charitableness of his disposition and character. But it is not necessary to rely upon probabilities in this case. We have direct evidence of the fact. The witnesses who have been so often referred to, declare that she was a believer in the Trinitarian doctrines; and upon this point also there has been no contradictory evidence whatever.

If we advert to the evidence of Mr. *Wellbeloved* and others of the defendants; what is it that they say to this point? They do not deny that she entertained Trinitarian opinions, that she was a Trinitarian in her belief. On the contrary, they say that they have heard and believe that very many of the Presbyterians at that period were Trinitarians, but, save from the probability arising from such circumstances, they cannot say whether she in her religious belief was a Trinitarian. They admit, therefore, the probability of her having been a Trinitarian; which is substantially to the same effect, though not so strong in the expression, as what Mr. *Wellbeloved* is reported to have stated upon this subject to the Charity Commissioners. For in their report they say, that Mr. *Wellbeloved* concludes from Lady *Hewley's* attendance at the chapel during Dr. *Colton's* time, and from the general state of religious opinions at that period, that she did not entertain what are commonly called Unitarian sentiments.

But the evidence as to this important part of the case does not rest here. Dr. *Colton* is admitted to have been a Trinitarian; no doubt is entertained upon that point. He must have been a Trinitarian, because, as he was the preacher

at *St. Saviour-Gate* Chapel, he must have subscribed the Articles, agreeably to the 17th section of the Toleration Act; and we are not to presume that he would have subscribed those Articles fraudulently, particularly a man of his character, his learning, and his piety. Dr. *Colton*, therefore, was a Trinitarian; he was the preacher at Lady *Hewley's* chapel; he was her adviser in religious matters; he was the executor to her will; he preached her funeral sermon; and in that sermon there is the strongest evidence of the double fact of Dr. *Colton* himself being a Trinitarian, and of Lady *Hewley*, with whose sentiments he was intimate, entertaining the same opinions. Never, therefore, was there a stronger body of evidence leading to any conclusion than this, to show that Lady *Hewley* did not entertain Unitarian opinions.

But I do not stop here. There is that document which has been adverted to by the learned Judge, namely, *Bowles's* Catechism. Passing over the question relating to the Trinity,—although the witnesses who are conversant with the subject state that *Bowles's* Catechism is to be taken as a Trinitarian catechism,—this at least is clear, that the doctrine of original sin is expressed in that catechism in the most clear and distinct terms. I agree entirely with what the learned Judge has stated, that, when Lady *Hewley* requires as a qualification for those persons who are to be admitted into the almshouse, that they should be able to repeat by heart *Bowles's* Catechism, she must be taken to have assented to the doctrines contained in it. If so, the evidence is clear that as to one material point she was a believer, viz. in the doctrine of original sin. And if we may rely on the testimony of those witnesses who have been examined, that this is a Trinitarian catechism, then that also establishes the fact of her being a believer in the doctrine of the Trinity.

I have thus endeavoured to show that Lady *Hewley* was a Presbyterian, and also to show what were the general doctrines of the Presbyterians at that time. And the result of the further inquiry has been to satisfy my own mind that Lady *Hewley* was not an exception to the general rule of belief of that class of Dissenters to which she belonged, but that she herself also was a Trinitarian, and a believer in the doctrine of original sin.

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That being the case, then, we are prepared for the more satisfactory consideration of the next point; what did she mean by "godly preachers of *Christ's* holy Gospel?" What were the doctrines the preaching of which she meant to promote and encourage? Is it possible to come to the conclusion, according to any ordinary rules of reasoning, that she intended to found a charity and bestow her property for the purpose of preaching doctrines directly at variance with her own? And this not as to subordinate and trifling and formal matters, but with respect to points that have always been considered by every church as essential; which she herself must have considered as essential. When I say points which have been always considered as essential, I am not using my own expressions; these are the expressions of a very learned person, Mr. *Kenrick*, one of the defendants. In the sermon lying before me, he says, "If others have established a distinction between those essential articles of faith, which cannot be rejected without perdition, and the non-essentials on which men may safely differ, we at least gain little by the relaxation; for I know of no church which does not regard as essential those very articles which our name implies that we reject."

Can we believe, then, I repeat it, that this pious lady would have given her funds for the purpose of promoting and encouraging the preaching of doctrines directly at variance with those opinions which she entertained upon points which have been universally considered as essential in matters of religious belief? At least it would require some fact or some argument to justify us in coming to such a conclusion. All the presumptions and probabilities are the other way; and as a question of fact, I feel myself obliged to come to this conclusion, that it is almost impossible to suppose that such could have been her view and intention.

But another argument arises out of the Act of Parliament to which the learned Judge has referred, or rather out of the Acts of Parliament of that period. Those preachers who denied the Deity of Christ were exempted, if they preached, from the benefit of the Act of Toleration. That Act was passed in the year 1688. In 1698, ten years afterwards, and six years before the date of the first of these deeds, the Act

against blasphemy was passed, in which those persons who denied that any one of the three persons in the Trinity was God, were subject to the severest penalties. Those were called impious and blasphemous doctrines; to teach them was called a detestable crime. I am not justifying the law; I am making no comment upon it; I am stating only what the law at that time was. Those persons who by preaching denied the doctrine of the Trinity,—I think the word is “teaching,”—who either in writing, in teaching, or advised speaking, shall maintain those doctrines, are subject to the penalties of the Act to which I have referred. It was contrary to law, therefore, at that time, to preach those doctrines. To give money for the purpose of encouraging and promoting the preaching of them, would also in itself be illegal.

What are the rules by which the conduct and the language of persons are to be interpreted? The rule is this, and it is a fair and proper rule, that where a construction, consistent with lawful conduct and lawful intention can be placed upon the words and acts of parties, you are to do so, and not unnecessarily to put upon these words and acts a construction directly at variance with what the law prohibits or enjoins. I cannot therefore bring myself to the conclusion, that Lady *Hewley* intended to promote and encourage the preaching of doctrines contrary to law, that she intended herself to violate the law. It would be contrary to every rule of fair construction and legal presumption so to decide.

It was argued, however, at the bar, that this law was now repealed; and it was supposed that the repeal of the law would make an alteration in the consideration of the case. It does not appear to me in the slightest degree to affect the question; which is, what was Lady *Hewley's* intention at the time? What, at the time when she executed this deed, she intended? Who were the persons whom she meant to include in it? What were the doctrines of which she intended to encourage and promote the preaching? It makes no alteration in this respect; it makes no change as to her intention at the time, that, a century after, the law has been changed, and that is considered as innocent, which at that period was illegal.

On these two grounds then, each of which appears to me

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conclusive; first, that I cannot presume that this pious lady intended that her estates should be employed to encourage and promote the preaching of doctrines directly at variance with what she must have considered as essential to Christianity; and, secondly, that she could not intend to violate the law; on those two grounds I feel myself, as a conclusion of fact, compelled to come to this determination, that she did not intend, under the description of "godly preachers," to include those persons who impugned the doctrine of the Trinity; that she did not intend to promote and encourage the preaching of those doctrines. With respect to the law, and her respect for its authority, we find some evidence of it in the deed of 1707; for she says, that if by any lawful authority the objects of her bounty, in that deed, cannot be carried into effect, then she directs her trustees to make a different application of the funds.

It has been said—and the learned Judge has adverted to it—that the religious opinions of that day were liberal and comprehensive, and that in particular Lady *Hewley* entertained large and liberal views upon subjects of religion. This, however, rests on general statement, of which there is no satisfactory evidence, and from which I can come to no precise or satisfactory conclusion. I am bound, therefore, for these reasons—having first established to my satisfaction that she was, in her religious opinions and belief, a Trinitarian—to come to the conclusion that she never intended that her bounty should be applied for the purpose of promoting or encouraging the preaching of Unitarian doctrines. This is the conclusion of fact to which I have come; and I have the more satisfaction in this result, because I came to it without at all knowing what were the opinions of my two learned friends, and without having had any communication with them upon the subject. I formed my opinion upon a careful consideration of the case, thus agreeing, not only in the conclusions, but in the grounds and principles upon which the learned Judges have come to them.

The question then that remains for consideration is this,—By whom have these funds been administered, and in what way have they been administered? The trustees are, with one or two exceptions, proved to be Unitarians; Mr. *Palmer*

is a member of the Church of *England*; Mr. *Heywood* was not proved to be Unitarian; with respect to the rest, as I understand and read the evidence, they entertain Unitarian opinions. What are these opinions? What, in their answers, do Mr. *Wellbeloved* and others of the defendants state to be Unitarian opinions? They state that they believe it to be true that the class of Christians styled Unitarians do reject, as unscriptural, the doctrine that *Jesus Christ* is really and truly God, and as such a proper object of divine worship. They believe it to be true that the class of Christians styled Unitarians do, many of them, reject, as unscriptural, the doctrine of original sin; or, that a man is born in such a state that if he were to die in the condition in which he was born and bred, he would perish everlastingly. These are the doctrines stated in the answers of Mr. *Wellbeloved* and several of the other defendants, as being the peculiar doctrines of the Unitarians.

An observation was made on the conduct of Mr. *Wellbeloved* with respect to his answers, stating that they were reluctantly extorted, obtained with difficulty. I think I owe it to Mr. *Wellbeloved* and to the other defendants to observe, that from the nature and the delicacy of the subject, they were justified in using much caution; and if we can fairly refer the conduct of men to proper motives, we are not justified in ascribing it to such as are improper. Mr. *Wellbeloved* may have considered that the questions were not, in the first instance, put in such a way as to lead properly to these answers; and he may have thought it his duty to exercise great caution on such a subject. But leaving this, besides the answers, we have from the mouth of Mr. *Wellbeloved*, and we also have from Mr. *Kenrick*, clear and distinct statements of what the opinions of the Unitarians are upon the points in question. I refer to a document which is in evidence, a sermon preached by Mr. *Wellbeloved* at *Hull*, in which he states his opinions in these terms: "With the doctrines concerning the deity of Christ, we also reject, as equally unscriptural, those which other Christian sects hold to be of such vital importance, relating to his office, and the design and consequences of his death. We see nothing in the pages either of the Old or New Testament to justify the doctrines which are generally

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deemed orthodox, relating to original sin :” so that he there states that they reject the doctrine concerning the deity of Christ, and this also relating to original sin. In another part of the same sermon he says, “ But it will be said that we deny his deity,” that is the deity of Christ ; “ We refuse to acknowledge him as the second person of the Godhead ; we do not allow him to be one God with the Father, co-eternal and co-equal, or even God of God.” “ We confess,” he says, “ the Man Christ Jesus, but deny him as that incarnate, suffering and dying God, which he is believed to have been by all others who bear his name. True, we do deny the Jesus of the Athanasian and the Nicene Creeds, of the Liturgy and the Articles of the Established Church, of the confessions of faith adopted by almost all the churches of Christendom.” Nothing can be more clear and distinct than these statements, not only as to his own opinions, but as to the opinions of those who think with him, and who come under the class and denomination of Unitarians. Now as to Mr. *Kenrick*, another of the defendants upon this record, a gentleman of talent and learning ; he says, “ We are convinced that no doctrines can ultimately prevail among a people allowed to think and examine for themselves, which, like transubstantiation, involve a sensible absurdity, or, like the Trinity, a metaphysical contradiction.” “ The surrender of their understandings,” he says, “ is a price which men will not long consent to pay for the belief of any system of theology.” Such are the doctrines stated by two of the defendants as the doctrines of the Unitarians. I consider, then, the great body of trustees and sub-trustees are disbelievers in the divinity, or to use the term of the Unitarians, the “ deity of Christ,” and disbelievers in the doctrine of original sin.

The next question is, how and for what purposes have the funds of this charity been applied by these trustees ? In what manner have they discharged the important duty that was entrusted to them ? If we are correct in the conclusion we have come to, as to the intention of Lady *Hewley*, the funds have been misapplied for a long series of years, and to a very great extent. This alone might be a sufficient ground for removing the trustees. But it has been said that this was unintentional upon their part, that it was an error of judg-

ment, that they put fairly and *bonâ fide* a construction upon the instruments that would have justified their acts. But looking at the evidence in this case, I am compelled to come to a different conclusion, and to say—though I do not wish to enter into detail upon the subject, because I am desirous as far as possible to abstain from everything that is personal on this occasion,—I am compelled to say, using the most gentle terms, that there has been in my judgment a strong and undue leaning in the administration of the funds towards the Unitarian doctrines and Unitarian purposes. I shall not go through the evidence with respect to this part of the case, but shall content myself in referring only by way of example to two points. First; How has it happened that almost all the trustees are Unitarians? That the vacancies have been so filled up as to make the whole body substantially Unitarian; as to place the entire control of these estates and funds, and the management of the whole charity, in the hands of Unitarian trustees, persons entertaining Unitarian opinions? Secondly; in illustration of what I have stated, almost all the exhibitions, of late years, have been given to persons educated at *Manchester College*. Upon a careful examination of the evidence, I must consider, that so far as relates to the education for the ministry, *Manchester College* is substantially an Unitarian establishment. I refer to the evidence, among others, of Mr. *Manning Walker*, who was himself educated as an Unitarian, and was a member of that college. It appears to me strong and decisive upon this point. If I required further confirmation, I might refer to Mr. *Wellbeloved's* circular letter, in which he calls upon the Unitarian Dissenters to subscribe to the support of that establishment, for the purpose of maintaining a succession of well-educated ministers in their class of Dissenters; obviously meaning—indeed the fact is proved by the evidence—those of Unitarian opinions.

These circumstances with others lead me, therefore, to the conclusion not merely that these parties have misapplied the funds, but that, in the exercise of their trust, they have manifested a strong and undue leaning in favour of persons of their own persuasion. I think then, looking at these circumstances, and considering the extensive and continued misapplication of the funds which has taken place, and adverting also to the

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consideration of the danger of future abuse if persons maintaining one particular class of opinions are to be entrusted with the management and entire control of funds which are to be applied for the benefit of persons maintaining other opinions, that I am bound to come to the conclusion that the Vice-Chancellor was correct in removing the trustees. After what I have already stated, it follows that I think he was correct in the declaration that he has made. And the result, therefore, of my judgment is this,—Feeling myself confirmed in the principles of it by the learned Judges near me, and coming to the further conclusions which I have stated, founded upon these principles, I think that the judgment of the Vice-Chancellor should be affirmed. It is not a case for costs.

Mr. Booth:—Does your Lordship think the trustees were not justified in appealing, considering the grounds that the judgment went upon, so as to be entitled to costs in a question so important?

Lord Lyndhurst:—I say nothing about their own costs.

Mr. Booth:—Does not your Lordship think it right to give them their costs out of the charity funds?

Lord Lyndhurst:—Certainly not.

Mr. Knight Bruce:—As your Lordship has not given to the relators the costs of the appeal, but has left each party to bear his own, your Lordship will think it right to add a declaration that the relators will have their expenses out of the fund?

Lord Lyndhurst:—Of course.

An order was accordingly made, affirming the Vice-Chancellor's decree, and referring it to the Master to tax the relators their costs of the appeal; the same to be paid out of the charity funds.

From the said decree and order the trustees appealed to this House, and the appeal came to be

heard in *May* 1839, in presence of the learned Judges whose opinions are hereinafter given.

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The *Attorney-general* (Sir *J. Campbell*), for the Appellants:—The Appellants, who are the trustees of Lady *Hewley's* charity, consist of two classes; one called the grand trustees, and the other the trustees of an almshouse. They have no personal interest in this question, and can derive no personal benefit from the manner in which the charity is administered; there is no corruption or misconduct imputed to them; but at the same time, they must feel a very deep anxiety as to the result of this appeal. By the decree against which they appeal, many individuals have been reduced to destitution, by being deprived of the assistance they had long enjoyed, without any blame being imputed to them. The Appellants likewise feel a still deeper interest, in considering that upon the result of the appeal depends very much the manner in which trusts for endowed Dissenting chapels shall be administered. The question is altogether of the greatest importance to religious liberty in this country. It is now to be determined whether, where there is a deed founding a charity for religious purposes and the objects of the founder are distinctly expressed, evidence is to be admitted, beyond the deeds, to show what are supposed to be the religious opinions of the founder, in order to put a construction upon the deed according to those supposed religious opinions; and the Judge before whom the question comes for decision, instead of looking at the construction of the deed, is to enter into a wide field of conjecture as to what might be the private intentions of the founder. It is likewise to be determined whether, where trustees

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have been appointed according to the provisions of the deed, the Judge is to inquire whether these trustees are of the same religious opinions that are supposed to have belonged to the founder, and to remove them from their office on the ground of their holding different religious opinions.

The history of this charity is well known. Lady *Hewley*, the foundress, was, on her husband's death, left with a very ample fortune; she was a pious lady, and took a deep interest in the fate of the ejected ministers on St. *Bartholomew's* Day 1662, under the Act of Uniformity, who could not by law, until after the Revolution and the Act of Toleration was passed, celebrate the rites of religion according to their consciences. Lady *Hewley* bountifully assisted and supported a considerable number of them, at a time when the celebration of the rites of religion, which they professed, was contrary to law. She did not withdraw her bounty from the Nonconformist clergy after the Revolution; and after the Act of Toleration had passed, she, in the years 1704 and 1707, executed deeds, by which a large portion of her fortune was conveyed to trustees for religious and charitable purposes. Those deeds were prepared by the advice of counsel, skilfully framed, and expressing in definite and distinct terms the objects that she had in view. This is not a case where the intention of the donor is left in doubt; where there is only some general, vague expression, and where the meaning cannot be guessed at even, without extraneous evidence; but on the face of the deeds the intention of the foundress is clearly and distinctly defined. By these deeds, she declared that she had six objects in view: first, to assist poor and godly preachers, for the time being, of *Christ's* holy Gospel; secondly, to assist poor and godly widows of

the same description of persons ; that is, of poor and godly preachers, for the time being ;—as I pass, I must draw attention to these words, “ for the time being : ” —thirdly, to encourage and promote the preaching of *Christ’s* holy Gospel in poor places : fourthly, to assist in the education of young persons intended for the ministry of *Christ’s* holy Gospel. These four objects related to preaching and teaching ; the two remaining apply to eleemosynary assistance to persons who were destitute, without the smallest reference to the propagation of any religious faith whatever ; the one being to assist poor and godly persons in distress ; the other, the maintenance of an hospital for ten almswomen above the age of fifty-five ; the building to be kept in repair, and the sum of 60 *l.* a year to be given for the maintenance of the old women. So that the objects of the charity were divided into preaching and eleemosynary relief.

There were seven trustees appointed by Lady *Hewley* herself, with a separate set of trustees appointed for the management of the hospital. She, in a very distinct and clear manner, defined what her objects were, and proceeded according to the best advice that professional assistance could afford her. She died in the year 1710, and it was upon her death that the objects of this charity were to be carried into effect. The seven trustees, whom she denominated Grand Trustees, belonged to a Presbyterian congregation that was founded by her at *St. Saviour-Gate*, in the city of *York*. The charity proceeded and was conducted, I humbly conceive, according to the will of the foundress. The will of the foundress is to prevail ; but the question is, how to find out the will of the foundress ? And this is one great question that

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your Lordships, with the assistance of the Queen's Judges, will have to determine.

Those trustees collected the rents and profits of Lady *Hewley's* estates, which were very considerable, and they applied them in maintaining the hospital, and in giving assistance to a vast number of dissenting congregations; latterly, to no fewer than 237. Those congregations were partly Presbyterian, partly Baptist, and partly Independent; these being the three great branches of Dissenters in this country. The trustees also, without considering the particular religious doctrines of individuals, assisted many persons in distress, from the funds of this charity. This system went on without complaint until the year 1827. It so happened that, of the Presbyterian congregations whose pastors were assisted out of this fund, a good many, between the time of Lady *Hewley* and the time when this complaint arose, had changed their religious opinions. It is alleged that in the time of Lady *Hewley*, those Presbyterian congregations believed in the doctrines of the Trinity, of original sin, and of the atonement; and it is truly alleged, that many of those congregations now do not believe in those doctrines; that although they are denominated Presbyterians, they have become Unitarians. Out of the 237 chapels to which assistance was given at the time when this complaint arose, there were 38 that were denominated Presbyterian, that had been what were called Orthodox Dissenters but had become Unitarian. But 38 only were of that description, all the rest being Baptists and Independents, with regard to whom there has not been any complaint from the relators, they themselves being Independents.

That change in the opinions of the Presbyterian congregations occurred before the middle of the last

century, and had gone on down to the time when this information was filed. This subject was brought, in 1827, before the Charity Commissioners, who expressed a strong opinion in favour of the honest and just administration of the funds of the charity, but suggested a doubt as to the proper objects of it, and thought that that should be determined by a Court of Equity. The question was submitted to the then Attorney-general, now Lord *Abinger*, who refused to interfere. As the charity was in the year 1827 administered in the same manner as it had been for more than 70 years; as there had been no complaint except by some Independents who wished to have a larger share than they had yet enjoyed; and as there was no charge of corruption or mal-administration beyond not giving the Independents all that they sought, Sir *James Scarlett* most wisely refused to interfere; whereupon, some private relators, men belonging to a persuasion who had largely shared in the bounty of Lady *Hewley*, but who, not content with that, resolved, as far as lay in their power, that the whole of it should belong to them, came forward, entirely regardless what misery or destitution might arise from the steps that they were determined to take.

When there are private relators who wish to file an information in respect of a charity, the Attorney-general cannot with propriety refuse the use of his name, if there be any arguable question to be submitted to a Court. The practice which I have followed, and which has been, I believe, adopted by all my predecessors, has been, upon a certificate by a gentleman at the bar saying that there is some question that may fairly be submitted to the Court, not to stop inquiry, but to give the sanction of our name. It was in these

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circumstances that, in the month of *June* 1830, this information was filed by private relators of the Independent persuasion, who, upon their own showing, were by no means of the same opinions with Lady *Hewley*; certainly not with regard to discipline, and I should doubt with regard to doctrine also. If, as they say, the charity is to be confined to persons who are of her religious opinions, the relators themselves must renounce the bounty which they have so long derived from this charity.

The information states that Lady *Hewley's* charitable works were specially extended to the poor and ejected ministers and Nonconformists of her time; and being minded and disposed to devote her property to the purposes mentioned in the foundation deeds, she had frequent conferences and consultations with her friends, as well as with counsel; under whose advice, and after mature deliberation, she several years before her death executed those deeds. It is clear, in the first place, that Lady *Hewley* was not *inops consilii*; and therefore no extrinsic evidence can on that ground be admitted for interpreting deeds so carefully and advisedly executed. The information further states that new trustees of the charity and managers of the almshouse were from time to time appointed, and the charity estates were conveyed to the new trustees by the surviving trustees, and that the fifth of such appointments and conveyances took place in the year 1755, when *Samuel Shore* (the father of one of the defendants), *Aymon Rich*, and *Thomas Lee*, were appointed; that Mr. *Newcome Cappe*, who was then elected minister of *St. Saviour-Gate* Chapel, became an *Arian*, and the congregation went over to the *Arian* persuasion. The information then states the appointment of the present trustees and managers,

and describes their religious opinions; alleging that, except the Messrs. *Heywood*, Mr. *Palmes*, and Mr. *John Wood*, every one of these trustees and managers is or was in his religious belief a Unitarian. Now it is to be observed that, although there is an exception of those four trustees, they, as well as the others, who are alleged to be Unitarians, are removed by the decree. The information further states that Mr. *Wellbeloved* succeeded Mr. *Cappe* as the preacher at *St. Saviour-Gate Chapel*, on Mr. *Cappe's* death in 1799; that he is now the preacher there, and is what is commonly called a Unitarian minister, and preaches Unitarian doctrines in that chapel, and that the congregation attending it are Unitarians. And the information charges that the sect of Christians commonly called Unitarians—so be it here observed that the relators admit Unitarians to be Christians—reject as utterly unscriptural the doctrines of “the Trinity of Persons in the Deity; the Incarnation; the true and perfect Divinity of the Person of the Son of God; that the Son of God is the second Person in the Trinity, and equal with the Father; the Divinity and Personality of the Holy Ghost, or Holy Spirit, as the third Person in the blessed Trinity, and equal with the Father and the Son; and the forgiveness of sins, and salvation, through the merit of the atonement.” The information then prays, among other things, that it be declared by the decree of the Court, “that such Dissenters alone as are now commonly called Orthodox Dissenters, and as would have been within the protection of the Act of Toleration (1 *Will. & Mary*), at the time of the foundation of the charities, and would not then have been subject to the penalties of the Act of the 9th & 10th *Will.* 3, against blasphemy, can now be considered as coming within the intent and

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meaning of Lady *Hewley*, and as entitled to participate in the benefit of her charities."

The effect of the Vice-Chancellor's decree, which is in the terms of the prayer of the information, is that not only with regard to preaching, but with regard to eleemosynary relief, no one shall be entitled to partake in the benefit of Lady *Hewley's* charities, unless he believe all the doctrines that Lady *Hewley* is supposed to have believed; and if any one varies from her creed, not only a minister who is to preach, but a starving pauper, he or she is to derive no benefit from the fund. And I must say, with great respect to the Vice-Chancellor, and to the noble and learned Judge who affirmed his decree, that the distinction between these two objects of the charity has not been kept in view by them.

The grand trustees, in their answers, say that, according to their information and belief, Lady *Hewley* was a person of very enlarged benevolence, and of great liberality and toleration of the opinions of others; that in the relief extended by her to suffering Nonconformists, she was not actuated by an exclusive regard to the peculiar creeds or religious sentiments of the objects of her bounty; and that they did not believe that her object, in instituting the charity, was to promote or encourage the spreading of any stated doctrines or forms of Protestant worship in particular; but that, in a spirit of general benevolence, she was desirous of extending her bounty to the numerous classes of professing Christians who were then, or might thereafter be, struggling with persecutions and pecuniary difficulties. They state that, as trustees of the charity, they are willing and desirous to act under the directions of the Court; and they submit that they ought not to be removed from being trustees

of the charities, for they insist that they were duly appointed trustees thereof, according to the directions contained in the original deeds of trust; and that, since the period of their appointments respectively, they have, conscientiously and to the best of their ability, duly acted in the execution of the trusts; and that they have, to the best of their judgment, in all respects acted in conformity with the spirit of Lady *Hewley's* directions regarding the management of the charity. They say that, since the information was filed, they have discontinued all the stipendiary allowances heretofore paid by them, although they do not admit that the same were improperly paid. Now can trustees so acting, and so ready to submit to the directions of the Court, be supposed guilty of misconduct? Yet they are ordered to be removed, but no provision is made for supplying their places. It will be found, on looking at the decree, that it is entirely silent as to who shall be the objects of Lady *Hewley's* bounty, and as to what shall be the qualification of the trustees that are to be substituted; and, in truth, this decree has been found to be utterly impossible to be carried into effect. The relators have been fighting upon it in the Master's office, from the time it was pronounced. Whether the trustees that are to be appointed shall be Baptists or Independents, whether they shall be Presbyterians connected with the church of *Scotland*, or Presbyterians of the Secession church, the Master is wholly unable to determine, because upon this subject the decree is profoundly silent.

Mr. *Wellbeloved*, who has been for upwards of forty years the minister of *St. Saviour-Gate* Chapel, was made a defendant to the information, as being one of the sub-trustees or managers of the almshouse; and he, after setting forth in his answer the doctrines of

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the Unitarians in his sense of the term, concludes by saying that he had, in discharging the duty of a sub-trustee of the said charity, always acted faithfully and conscientiously, and to the best of his judgment and ability; and in the further execution of the duties of the trust, he is ready and willing to act as the Court shall be pleased to direct.

Mr. *Palmes*, another of the sub-trustees, whose duty it is to select the poor old women for the almshouse (for they have no share in the management of the trust-estates), says, in his answer to the charge of being a Unitarian, "that he is a member of the Church of *England*, and does not attend any congregation commonly or otherwise called Unitarian, and that he is not well acquainted with the doctrines and opinions of the persons called Unitarian." Now Mr. *Palmes* is removed, although a Church-of-*England* man; and this doctrine is to be laid down, that a member of the Church of *England* is incompetent to be a trustee for the purpose of selecting certain old women to be admitted into an almshouse.

One of my positions is, that these almswomen may be of the Church of *England*. Even if they were required to be Dissenters, there would be no objection to a member of the Church of *England* being a trustee for selecting proper objects of Lady *Hewley's* bounty, and for exercising honourably and beneficially all the duties of such trustee. But when it appears that the almswomen may belong to the Established Church, is it to be held that a person is disqualified from acting in execution of the trust of the almshouse, because he is a member of the Church of *England*? Mr. *Palmes* is not alleged in the information to be a Unitarian, and indeed he is proved to be a churchman; and therefore the argument or inference *noscitur a sociis*

cannot apply to him; yet this decree removes him, with the other trustees.

Mr. *John Wood*, who has been lately elected one of the grand trustees, and was made a defendant to the information by amendment, says in his answer that since his appointment he has taken no part in the execution of the trusts, and that in the future execution of them he is desirous to act under the directions of the Court. What misconduct can be imputed to Mr. *Wood*, to justify his removal? It is not alleged that he is a Unitarian, nor that there has been any misapplication of the charity funds; nor was there any distribution of them at all since his appointment; yet Mr. *Wood* is removed, although he declares he is desirous to abide by the directions of the Court in the execution of the trusts.

A vast body of evidence was given by the relators in this cause. I complain of part of that evidence being admitted and acted upon; because I shall submit to your Lordships that it was the office of the learned Judge, before whom this cause came, to look at the deeds, so carefully and technically prepared, and to put a construction upon them, without at all travelling into evidence *dehors* the deeds. But there was also evidence for the purpose of showing, what I should not at all have complained of, namely, the meaning affixed to particular words at a particular time; that would be perfectly legitimate; nor should I have objected to the evidence of usage, to show in what sense the words were used at the time the deed was executed: but what I do complain of is, that evidence was admitted and acted upon, both by the Vice-Chancellor and by Lord *Lyndhurst* and the two learned Judges who assisted him, with a view to show in what sense Lady *Hewley* used particular words. You

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may go into evidence, in the interpretation of ancient documents, with regard to the sense in which particular expressions were used at a particular time; but you cannot go into evidence, be the deed ancient or be it modern, to ascertain in what sense the words were employed by the person by whom the deed is executed.

Lord *Brougham*:—You can give evidence legally and strictly of the circumstances in which the party making the deed was, by way of inferring therefrom the meaning of the deed.

The *Attorney-general*:—I apprehend, where there is no latent ambiguity, that you cannot at all travel into extraneous evidence. You may show the circumstances under which the party makes the deed; for example, you may show how many children a testator had, how many sons and how many daughters he had, in order to put a construction on his will.

Lord *Lyndhurst*:—Was there any objection made to the reception of the evidence before the Vice-Chancellor? This case was heard by the Vice-Chancellor; it was afterwards heard before the learned Lord who has just addressed the House, and afterwards heard before me. The same evidence was received upon each occasion, and I do not recollect that any objection was made to it when the case was before me.

Lord *Brougham*:—I have no recollection of any objection taken before me, to any evidence at all.

The *Attorney-general*:—There was an immense body of evidence given; and at the first hearing there was an arrangement come to that the relators might read what they pleased *de bene esse*, and that that which was not proper evidence was to be considered by the Vice-Chancellor as the speech of counsel.

Lord *Lyndhurst*:—That is a course that never

should be pursued, because that would leave it for the party to determine what is evidence, without any objection by the other party, and without argument. It may have been an arrangement among the counsel, but that is not the way to deal with the Court.

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The *Attorney-general*:—I can show that the arrangement was come to when the cause was before the Vice-Chancellor. Then, when it came before Lord *Brougham*, and afterwards before Lord *Lyndhurst*, it was necessary that the same arrangement should be carried into effect.

Lord *Brougham*:—Then it would have been convenient and fair to the Court that the arrangement should have been disclosed; and I am sure it never was disclosed to me.

Lord *Lyndhurst*:—If the parties, by an agreement between themselves, allow that to be read in evidence which in strictness is not evidence, and if no objection is made, the Judge gives his opinion upon the effect of the evidence.

The *Attorney-general*:—If what was read in evidence ought not to be an ingredient in the judgment of the Court, I say, with great respect but with great confidence, that that judgment was erroneous if it proceeded upon that evidence. Suppose facts are stated in a special verdict which ought to have no influence upon the judgment of the Court, it is immaterial that they are stated.

Lord *Lyndhurst*:—Suppose evidence is offered at *Nisi Prius*, and an objection is made to it, and the party says, I waive any objection; and the jury find a verdict upon that, and an application is made for a new trial, will not the Judge say, You waived your objection?

The *Attorney-general*:—Suppose an objection taken

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to the competency of a witness is waived, you cannot then move for a new trial upon the ground that the witness was incompetent; you are to take as a fact what he has proved: but suppose what he has so proved is a fact wholly irrelevant, then it ought not to form an ingredient in the verdict of the jury or judgment of the Court.

Lord *Brougham*:—That does not go to the admissibility, but to the effect of the evidence.

The *Attorney-general*:—Certainly, to the effect; and my objection remains untouched, even supposing that the inadmissible evidence had been read, and read without objection, or that the Judge had, upon argument, decided that the relators were entitled to read it.

Lord *Lyndhurst*:—If facts were proved that were irrelevant to the issue, of course they ought to have been rejected. The evidence of *Lady Hewley* being a Trinitarian was received without objection. The next question is, whether the conclusion from the evidence that she was a Trinitarian was correct; and if it was, then what application the fact so proved has to the question in issue.

The *Attorney-general*:—I deny that it was proved that *Lady Hewley* was a Trinitarian: there was some evidence, proper evidence, to show that she was not a Trinitarian, and that was her preference of *Bowles's* Catechism; for the catechism that was then in general use among the Dissenters was the shorter catechism of the Assembly of Divines at *Westminster*, a beautiful compendium of Calvinistic divinity, and decidedly Trinitarian. The doctrine of the Trinity being distinctly taught in the catechism of the Assembly, and that being the catechism chiefly in use among the Dissenters in *Lady Hewley's* time, the preference

given by her to *Bowles's* Catechism, which does not directly teach that doctrine, would be evidence to show that she was rather an *Arian* than a Trinitarian; because the *Arians*, and even some Unitarians, believe in the doctrine of the atonement and original sin; as Mr. *Firmin*, for instance, believed in those doctrines; so that it is not a test of Trinitarianism to believe in those doctrines; nor does a disbelief in them prove a person not to be a Trinitarian; as Dr. *Jeremy Taylor*, for instance, who believed in the Trinity, did not believe in original sin or the atonement.—[The Bishop of *London* signified his dissent.]

But to return to my argument. I say that Lady *Hewley's* trust-deeds are not at all to be construed according to her private opinions. If I could have shown by evidence that she was a Unitarian in her belief, then all Trinitarians are to be excluded from the benefit of this charity, according to the case made for the relators. If I could have shown that, although she went to *St. Saviour-Gate* Chapel, where Trinitarian doctrine was preached, she said, "Although it suits me to conform to the Presbyterian form of worship, and to be professedly a member of a congregation believing in the doctrine of the Trinity, still *I* do not believe in that doctrine; I am a Unitarian; and my object in founding this charity was, not that Trinitarian, but that Unitarian doctrine might be propagated:" then, according to the rule that is laid down on the other side, such evidence would have been admissible, and ought to have been acted upon; and now, that the Unitarian doctrine may legally be propagated, it would be competent for a relator to say that it was an abuse of the charity to administer relief to any Trinitarian, that the Baptists and Independents ought entirely to be cut off, and that it should be

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confined exclusively to Unitarians, because *Lady Hewley*, in her private belief and in her heart and conscience, was a Unitarian and not a Trinitarian. Such is the necessary and inevitable consequence of the doctrine for which the Respondents have to contend; while the Appellants say her will is to prevail; but it is her will as it is to be gathered from the language that she has employed in the deeds she has executed.

The chief grounds on which the Vice-Chancellor's decree proceeded, and on which it is now to be supported, is that,—as appears from the short reasons subjoined to the Respondents' printed case,—“Because *Lady Hewley* was a Trinitarian in belief and doctrine, the application of her charities to the benefit of ministers or preachers of what are commonly called Unitarian belief or doctrine, and their widows and members of their congregations, was and is inconsistent with her design and intention.” That is the only reason alleged on the part of the Respondents. All, therefore, turns upon the private doctrinal opinions of *Lady Hewley*; not upon the construction of her deeds; not upon her regulations; not upon anything that is to be considered as part of the foundation of her charity; but upon her private opinions. And if it can be shown that such is the law; that where there are deeds so prepared and executed as these were, you are not to construe them according to what appears upon the face of them, but you are to travel into parol evidence to see what was the private opinion of the party who executed them; there may be some reason to contend that this decree is to be affirmed. But that fails, unless it can be shown that the private opinion of the founder is to be regarded; and then it would be open to the Appellants to have

shown that she was a Unitarian, or belonged to any other religious sect; that she was secretly a Catholic, for that was not uncommon at that time; and that therefore this charity shall be confined, as far as the law will allow, to persons who profess the Roman-catholic faith.

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My first proposition in point of law is that this evidence ought not to have been admitted, or, if admitted, that it ought not to be acted upon; and that it is a foundation upon which the decree cannot rest. I submit that the will of the foundress, which is to prevail, is to be gathered from the language which she employed in the deed. That deed is not an executory instrument; and this is not a case in which an application is made to a Court of Equity to carry into effect the half-expressed intention of the foundress; but the information proceeds upon the grounds that both deeds constitute a charity; and, as I submit, they are the only foundation upon which the decree can rest. If, according to the just construction of both deeds, Unitarians are excluded, then, as far as preaching is concerned, the decree may be affirmed. But unless it can be shown by a perusal of these deeds that Unitarians are excluded, they are entitled, with other sects of Christians, to partake of the bounty of *Lady Hewley*.

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The books abound with cases, in which it has been held, as a general rule, that the Court cannot receive any evidence of intention out of the written instrument; that such instrument, whether a deed or a will, must speak for itself. In the case of *Goodinge v. Goodinge* (k), there was a legacy to such of the testator's nearest relations as his executors should think poor,

(k) 1 Ves. sen. 231.

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and objects of charity: Lord *Hardwicke* rejected evidence as to what was the testator's intention.—

Lord *Brougham*:—When I spoke of evidence being admitted of the sentiments of the party, it was not for the purpose of showing what he meant; for the question is not what he meant, but what he has declared he meant. But to understand an instrument, evidence is admissible to show the state of the family, always supposing that there is no patent ambiguity.

The *Attorney-general*:—Yes; as if a testator leaves a legacy to his nephew *John*, and he has two nephews named *John*, then *ex necessitate* evidence is admitted to remove that ambiguity. It is not a patent but a latent ambiguity; it is introduced by evidence, and must be removed by evidence. Lord *Hardwicke*, in the case to which I have referred, says, evidence cannot be allowed to “show that the testator meant to use general words in this or that particular sense, nor to show that the testator was offended with any one, and said he should not be included in the number of relations,” nor to show what the testator meant by his “nearest relations.” Upon the same principle, evidence is not to be allowed to show whom Lady *Hewley* meant by the declaration she has made with respect to “poor and godly preachers, for the time being, of *Christ's* holy Gospel.”

In *Edge v. Salisbury* (1), there was a bequest to “such of my nearest relations as my executors shall think the greatest objects of charity.” Evidence was tendered to show that the testator meant to comprehend first cousins; but Lord *Hardwicke* refused it, “because it would be to construe words which of themselves carry a meaning;” that is, to admit extraneous evidence to show what was the sense in

(1) 1 Amb. 70.

which the words were spoken; which is never to be admitted. In *Green v. Howard* (*m*), there was a legacy “among such of my relations as shall be living at my wife’s death:” Lord *Thurlow* refused to admit parol evidence to show that the testator received second cousins with equal kindness as first cousins; saying, “The sense of the words, as fixed by legal authority, is not to be altered by the language held on any occasion by the testator, or by his behaviour. There is no particularity in this will to alter the sense of the word relations.” In a late case, which your Lordships may all recollect, *Doe dem. Chichester v. Oxenden* (*n*), the testator devised his “estate of *Ashton*.” Only part of an estate, which the testator used to call his *Ashton* estate, was in *Ashton*; and the question was, whether the devise should be confined to that part of the estate which was in *Ashton*, or should be extended to all his estate. The words which he used carrying a sufficient meaning, all parol evidence to show the sense in which he used those words was rejected; and Lord Chief Justice *Gibbs* laid down the general rule, that evidence of intention is admitted only where there is latent ambiguity (*o*); that is, where the parol evidence shows the ambiguity, then by like parol evidence the ambiguity may be removed. I will only remind your Lordships of one other case, *Nicholls v. Osborn* (*p*), where it was held, that as plate passes by the bequest of household goods, parol evidence is not receivable to show that that was not the intention of the testatrix. There was a legacy of “all my household goods.” The question was, should plate pass? That depended upon the intention of the testatrix, which was to be gathered from the language

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(*m*) 1 Bro. C. C. 31.

(*o*) 4 Dow, 93.

(*n*) 3 Taunt. 347; 4 Dow, 72.

(*p*) 2 P. Wms. 419.

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employed in her last testament. Would the Court admit evidence to show that she always said, "When I say household goods, I mean exclusive of plate; and I think plate ought always to go to the next heir, or as an heirloom to the heir at law?" If the private opinion which is in the mind of the person who executes a will or deed, is to be received in one case, it must be received in all. I contend that the Court is not to receive any evidence to get at the sense in which the words were used by the individual, when there is no latent ambiguity, but to look at the language employed, and put upon that language its just and legal interpretation.

Now, rejecting, as your Lordships are bound to reject, all evidence respecting the private belief of Lady *Hewley*, the question is, what construction will your Lordships put upon her deeds, looking at those deeds only? Does she exclude all persons of Unitarian opinions from having any of her bounty as to preaching? Does she exclude them with regard to eleemosynary relief? Does she exclude all such persons from being her trustees? I shall first consider the question of construction without regard to the statute law; and afterwards consider what effect, upon this construction, is to be given to the statutes that were in force and that have since been repealed. First, let us suppose that there were no statutes upon the subject; that those deeds are to be construed as if they were deeds executed subsequent to the 53d G. 3, when the statutes against persons impugning the doctrine of the Trinity were entirely repealed; or let us suppose that at the time when Lady *Hewley* executed those deeds there had been no such statutes in existence. In the deed of 1704, she declares that the trustees, after payment of certain charges and expenses, shall, out of the residuary rents and profits, pay such sums of money,

yearly or otherwise, “to such and so many poor and godly preachers, *for the time being*,”—words that will become very material hereafter,—“of *Christ’s* holy Gospel, and to such poor and godly widows, *for the time being*, of poor and godly preachers of *Christ’s* holy Gospel, at such time or times, and for so long time or times, and according to such distributions, as the said trustees and managers for the time being, or any four or more of them, shall think fit.”—[The *Attorney-general* having read the whole of the declaration of the trusts, proceeded:]—

What is there here to exclude Unitarians? What is there to require that the objects of her bounty should believe in the doctrine of the Trinity, or of original sin and the atonement? What is there, upon the face of the deed, to require that that should be a qualification? If Unitarians are not preachers of *Christ’s* holy Gospel, and are not to be considered as Christians, of course they would be excluded; but, on the contrary, if I shall show your Lordships that, although, unfortunately, they do not believe in those holy doctrines, they have been, and are, treated as Christians, and are comprehended in the term “preachers of *Christ’s* holy Gospel,” then they are to be included instead of being excluded. There is now no question as to the clergy of the Church of *England* being excluded from this charity by the words “poor and godly preachers,” by which terms Nonconformist ministers alone were described at the time of the execution of those deeds.

With respect to the appointment of trustees, the deed declares that when any trustee should die, the survivors should elect in his room such a person as they in their judgment and consciences should think fit. The foundress prescribes no qualification; she

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does not say that they shall be Trinitarians, or believe in the atonement, which she might easily have done if she intended it. They are not required to believe in her opinions, but to be such persons as the trustees whom she had named shall think fit. She places unbounded confidence in them: "And in case of the death of any such new-elected trustee, to elect in like manner in his room another like person," without any qualification as to doctrine or belief, but another person who should be approved of by the surviving trustees. And so the trustees were successively to be elected according to the judgment and consciences of those who were then acting as trustees. If *Lady Hewley* had died after executing this deed, is there any ground for saying that in construing it no persons should be allowed to administer or participate in her bounty, although they were Christians and preachers of the Gospel, who did not believe in particular doctrines? Is there any ground for saying that those destitute objects for whom she meant to provide should have no benefit unless they likewise believed in particular doctrines?

Referring now to the deed of 1707, your Lordships will see that it does not in the slightest degree alter the construction that ought to be put on the deed of 1704. The trusts of the deed of 1707 are, that after *Lady Hewley's* decease, the trustees should permit the new-erected almshouse to be for ever used as a hospital for poor people, as the same then was; that they should, out of the rents and profits of the premises, pay all costs and expenses concerning the reparation of the premises, in providing catechisms for the poor people of the hospital, or in performance of the trusts, or the management of the trust estate; and that they should, out of the rents and profits, raise yearly the clear sum of 60*l.*,

and dispose of the same for the benefit and support of the poor people whom the trustees should from time to time elect or put into the almshouse. There is nothing in this deed to prevent the trustees from placing in the almshouse any Christian persons whom they in their discretion might select. There are qualifications with regard to age and moral character, but none with regard to religion. By an indorsement on this deed, it is provided that the management of the almshouse should be in *Thomas Colton* and others—who are there named, and in this appeal called sub-trustees,—and that the trustees in the deed of 1704, called the grand trustees, should at the beginning of each year leave the monies for paying the monthly allowances to the almswomen in the hands of the sub-trustees, whose duties are there defined, and one of which is simply to put poor women into the almshouse on a vacancy. Now *Mr. Palmes* is held to be incapable of performing that duty, as being a member of the Church of *England*, and he is accordingly removed by the decree from the office of trustee.

It becomes material to consider the rules and orders which *Lady Hewley* desired to be observed by the trustees respecting the qualifications of the poor women to be elected to the almshouse, from time to time ; as they, being referred to in the deeds, become part of the instruments by which the charity is founded, and form, therefore, part of the will of the foundress : and although we deny the right of ascertaining her intentions by extrinsic evidence, we do not at all dispute that due weight is to be given to any document referred to in her deeds. By these rules certain qualifications are required of the almswomen : they are to be “ poor and piously disposed,” and of “ the Protestant religion,” but not exclusively of the Church of *England*,

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nor excluding members of that church. Roman-catholics would be excluded, but all poor pious persons of the Protestant religion would be eligible if they submitted to the test which is imposed by these rules, of repeating the Commandments, Creed, and *Bowles's* Catechism, and of repairing to some religious assembly of the Protestant religion every Lord's-day.

Now, first, what is the effect of those rules with regard to the qualifications of the almswomen? Secondly, what effect have they upon the other objects of Lady *Hewley's* bounty? With regard to the almswomen, I admit that they must not only be able to repeat, but to repeat with a good conscience and with a pious belief, the Lord's Prayer, the Apostles' Creed, the Ten Commandments, and Mr. *Bowles's* Catechism: and I allow, as was said by a noble and learned Judge (*q*), that this is not to be considered as an exercise of memory, but as a proof of faith. But then I say that all those, according to the interpretation put upon them by Unitarians, may be piously, as far as the doctrine of the Trinity is concerned, repeated, with a firm conviction of their truth, by those who would be excluded by the decree of the Vice-Chancellor. The Unitarians insist that they piously believe in the Ten Commandments; that they piously repeat the Lord's Prayer; and that they are perfectly willing to repeat the Apostles' Creed. *Bowles's* Catechism does not directly teach the doctrine of the Trinity. The shorter catechism of the *Westminster* divines contains the question and answer: "How many Persons are there in the Godhead?—There are Three Persons in the Godhead, the Father, the Son, and the Holy Ghost; and these three are one God, the same in substance, equal in power and

(*q*) Lord *Lyndhurst*, vide *ante*, p. 395.

glory." This catechism expressly teaches the doctrine of the Trinity. In *Bowles's* Catechism, although the doctrine of original sin and the atonement appear to me—I speak with great diffidence upon such subjects—to be distinctly taught, the doctrine of the Trinity is not to be found, and I apprehend that any Unitarian might with a good conscience repeat *Bowles's* Catechism.—

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The *Bishop of London*:—An Arian may, but not a Unitarian.

The *Attorney-general*:—If Unitarians disbelieve the doctrines of original sin and the atonement, they could not sincerely repeat *Bowles's* Catechism, which seems to me to teach both these doctrines. But whether Unitarians disbelieve in those doctrines or not, they may, with regard to the Trinity, conscientiously repeat this catechism, because the doctrine of the Trinity is not there to be found. But it is part of that which is contended for on the other side, and it is an ingredient in the decree of the Vice-Chancellor, that any person that disbelieves the doctrine of the Trinity is excluded from this charity. He must believe in the doctrine of the Trinity; he must believe in original sin; he must believe in the doctrine of the atonement; and unless he believes in all these, he is excluded.

Conceding that *Lady Hewley* required that the almswomen should believe in original sin and the atonement, by requiring that they should repeat *Bowles's* Catechism; I submit that she does not require that they should believe in the doctrine of the Trinity. An Arian who believes in the doctrines of original sin and the atonement, but does not believe in the Trinity, would be entitled under *Lady Hewley's* regulations, but is excluded by the decree of the Vice-Chancellor; and therefore, admitting that no one shall be allowed

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to enter this almshouse who does not conscientiously believe those holy doctrines of original sin and of the atonement, I contend that there is nothing in Lady *Hewley's* regulations insisting upon *Bowles's* Catechism, that would exclude an Arian: And we know an Arian is as little a Trinitarian as a Unitarian is; he denies the divinity of our Saviour just as much.

Lord *Lyndhurst*:—The decree is simply this: to declare that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and that persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the charity.

The *Attorney-general*:—Preachers and persons of what are commonly called Unitarian belief and doctrine, are those who do not believe in the doctrine of the Trinity, but who still are Christians, who believe in the divine mission of our Saviour, who believe that the Scriptures contain the revealed will of God; but who do not believe in the doctrine of the Trinity, or the doctrines of original sin and the atonement. Any person who is an Arian would most undoubtedly be excluded, although believing in the doctrines of original sin and the atonement.—

The *Bishop of London*:—Not by the words of the decree.

The *Attorney-general*:—The decree refers to what are usually called Trinitarian opinions. The objection made to the trustees is, that they do not believe in the doctrines of the Trinity, original sin, and the atonement. It is not what they do believe in, but what they do not believe in; and the Arian just as little believes in the Trinity as the Unitarian does.

The *Bishop of London*:—Does he as little believe in the atonement? That is the point.

The *Attorney-general* :—I believe some Arians do, other Arians do not.—

The *Bishop of London* :—Those who believe in it are not excluded by the decree.

The *Attorney-general* :—As far as the decree goes, any old woman is to be excluded from the charity if she disbelieves in the Trinity, original sin, and the atonement, although she may believe in every other doctrine of the Christian religion, and may be most exemplary in her life and conversation.

We come now to the more important question, what effect have the rules, governing the admission to the almshouse, upon the other objects of Lady *Hewley's* bounty? If it were conceded that none but Trinitarians are to be admitted into the hospital, does it necessarily follow that none but Trinitarians shall be allowed as preachers to participate in her bounty? Does it follow that none but Trinitarians in distress may be relieved from the fund which she has provided? For to that extent the Respondents must go to support the decree of the Vice-Chancellor. What ground is there for saying, that because Lady *Hewley*, in regulating the almshouse, said that the almswomen should submit to a certain form of worship, she would not tolerate any other? There was an obvious reason why she should wish that all who were admitted into the hospital should be of the same creed; they were to spend the rest of their lives together; they were twice a day to celebrate divine worship together; and there are regulations respecting the service being read in public. As there was to be this worship in the hospital, it was material that all who were admitted should be as nearly as could be of the same religious faith, that there might not be brawling and disputation and feuds created among them. It was, there-

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fore, very natural that she should require that those who were admitted into the hospital should submit to a particular test: the test she appoints is the Creed, the Ten Commandments, and *Bowles's* Catechism. This strengthens the argument with regard to the other objects of her bounty, because it shows that she knew how to apply a test. She applies a test to the almswomen: how easy would it have been for her to say that none should be allowed to receive her bounty, unless they would repeat the Creed, the Ten Commandments, and *Bowles's* Catechism? Or, it would have been still more easy for her to say, unless they be Trinitarians, or answer the description of orthodox Dissenters; but she only says they shall be "poor and godly preachers of *Christ's* holy Gospel;" and the question is, whether within that description a person may not come, although he may not be a believer in the Trinity? And then the question really does arise, whether Unitarians may not come within this description of "godly preachers, for the time being, of *Christ's* holy Gospel?" It lies upon the Respondents to show that Unitarians are not within that description. I say that all sects, all Non-conformists who are fairly to be considered as godly preachers of *Christ's* holy Gospel, are included. If they are included in the objects that have reference to preaching, *à fortiori* they are included in those objects that have reference to eleemosynary relief.

But if the *onus* be cast upon me to show that Unitarians are godly preachers of *Christ's* holy Gospel, I am willing to bear the burden; and for that purpose I will refer to the account Mr. *Wellbeloved* gives of his faith, as set forth in the Respondents' appendix, from his answer, and on which they rely that persons having this faith are not Christians.—[The *Attorney-*

general, after reading the answer as before set forth *ante*, p. 367, proceeded :]—

Are your Lordships to hold that Lady *Hewley* would consider a person, holding those doctrines, not to be a Christian and godly preacher of *Christ's* holy Gospel? It is material to see how men of great and acknowledged eminence, and whose opinions were likely to sway with Lady *Hewley*, viewed persons entertaining those doctrines; and for that purpose I will read a few extracts from works that were most read in her time, beginning with *Milton's* "Tract on True Religion, Heresy, Schism, and Toleration," published by him in the year 1673, when Lady *Hewley* had attained woman's estate:—"What! are Lutherans, Calvinists, Anabaptists, Socinians, Armenians, no heretics?" *Milton* answers that "Socinians" (who correspond with Unitarians of the present day) "are no heretics. Heresy is in the will and the choice professedly made against Scripture; error is against the will in misunderstanding the Scripture, after all sincere endeavours to understand it rightly," &c. "The Arian and Socinian are charged to dispute against the Trinity: they affirm to believe the Father, Son and Holy Ghost according to Scripture, and the Apostles' Creed: as for the terms of Trinity, Trinity-unity, Co-essentiality, Tri-personality, and the like, they reject them as scholastic notions, not to be found in Scripture, which by a general Protestant maxim is plain and perspicuous abundantly to explain its own meaning in the properest words belonging to so high a matter, and so necessary to be known; a mystery indeed in their sophistic subtleties, but in Scripture a plain doctrine. Their other opinions are of less moment: they dispute the satisfaction of *Christ*, or rather the word satisfaction, as not scriptural; but

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they acknowledge him both God and their Saviour." I now read what Mr. *Locke*, in his treatise on the Reasonableness of Christianity, says:—"As men, we have God for our King, and are under the law of reason; as Christians, we have *Jesus* the Messiah for our King, and are under the law revealed by him in the Gospel." "He that believes one eternal, invisible God, his Lord and King, ceases thereby to be an Atheist; and he that believes *Jesus* to be the Messiah, his King, ordained by God, thereby becomes a Christian, is delivered from the powers of darkness, and is translated into the kingdom of the Son of God; is actually within the covenant of grace, and has that faith which shall be imputed to him for righteousness; and if he continues in allegiance to this his King, shall receive the reward, eternal life." "That which is required of them is a sincere endeavour to know his mind, declared in the Gospel, and an explicit belief of all that they understand to be so." "These two, faith and repentance, that is, believing *Jesus* to be the Messiah, and a good life, are the indispensable conditions of the new covenant. Whenever men take upon themselves to go beyond those two articles, where will they stop?"

Bishop *Watson*, in his "Considerations on the Expediency of revising the Liturgy," thus expresses himself: "Was I compelled to receive a creed of *human* composition, I would more willingly, in these enlightened times, receive one from *Locke*, *Clarke*, or *Tillotson*, than from either *Athanasius* or *Arius*, or even from hundreds of contentious or political Bishops assembled in solemn council at *Nice*, *Antioch*, or *Armenia*." "With respect to the doctrine of the Trinity, as explained by *Athanasius* or any other man, I cannot look upon it to be so fundamental in religion as to

think we should be guilty of sin in consenting to revise or even to change it. If in this I differ from some, I have others to support me; nay, I have the great principle of all the Protestant churches in the world in my favour; for it is a principle with them all to admit the fallibility of all human explications of Scripture. Every human explication, then, of the Trinity may be an erroneous explication; and what may be an error, cannot be and ought not to be imposed as a fundamental Christian verity."

Dr. *Hey*, a Professor of Divinity at the University of *Cambridge*, thus writes:—"We and the Socinians are said to differ; but about what? not about morality or natural religion, or the divine authority of the Christian religion. We differ only about what we do not understand, and about what is to be done on the part of God."

Baxter, who is well known to have been held in great veneration by Lady *Hewley*, in a treatise called "*Baxter's Saints' Rest*," thus writes:—"Two things have set the church on fire, and have been the plagues of it for above a thousand years. First, enlarging our creed and making more fundamentals than God ever made. Second, composing (and so imposing) our creeds and confessions in our own words and phrases. When men have learnt more manners and humility than to accuse God's language as too general and obscure (as if they could mend it), and have more dread of God, and compassion on themselves, than to make those fundamentals or certainties which God never made so; and when they reduce their confessions, first, to their due extent, and second, to scripture phrase (that Dissenters may not scruple subscribing), then (I think), and never till then, shall the church have peace about doctrinals. It seems to

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me no heinous *Socinian* notion, which *Chillingworth* is blamed for; namely, Let all men believe the Scripture, and that only, and endeavour to believe it in the true sense (and promise this), and require no more of others; and they shall find this not only a better, but the only means to suppress heresy and restore unity."

Lord *Kenyon*:—The passage now read from *Baxter* seems to imply his general disapprobation of creeds: can any extract be read in which he implies an approbation of the opinion of Unitarians upon the doctrine of the Trinity?

The *Attorney-general*:—*Baxter* was a strong Trinitarian, undoubtedly; but he was against making any religious distinctions; and he, I apprehend, if he had been founding a charity, would not have at all adopted any such exclusive rule as that for which the Respondents contend. The fact of his being a Trinitarian gives greater weight to the opinion that he expresses with regard to compulsion, and his condemnation of the doctrine of exclusion and of particular tests.

Dr. *Calamy*, in his abridgment of the Life of *Baxter*, written in 1713, says that *Baxter* "proposed the offering to the Parliament the Creed, Lord's Prayer, and Ten Commandments, as the essentials or fundamentals of Christianity, containing all that is necessary to salvation. When they objected that this might be subscribed by a Papist or Socinian, his answer was, that it was so much the better and the fitter to be the matter of concord: but that if they were afraid of communion with Papists and Socinians, it should not be avoided by making a new rule or test of faith which they will not subscribe to, or by forcing others to subscribe to more than they can do." "They

resolved, however, to hold on in the way they had begun, and so all that he had left to do was to use his endeavours to prevent their multiplying fundamentals needlessly." And in *Baxter's* own writings, his "Cure of Church Divisions," he says, "The effectual belief of pardon and eternal glory given through *Christ*, and the love of God and man, with the denial of ourselves and fleshly desires, and contempt of all things in the world, with a humble, patient enduring of all which must be suffered for these ends, is the nature and sum of the Christian religion."

Dr. *Thomas Manton*, who was a Presbyterian Dissenter, and a contemporary of *Baxter*, says in a part of his works, "Then do we honour the Trinity in Unity, not when we conceive of the mystery, but when we make a religious use of this high advantage to come to God in the name of *Christ* by the Spirit, and look for all from God in *Christ* through the Holy Ghost. Direct your prayers to God the Father; *Christ* prayed to the Father." "Christians need not puzzle themselves about conceiving of Three in One, and One in Three; let them in this manner come to God, and it sufficeth; make God the object, and *Christ* the means of access, and look for help from the Spirit." Now *Manton* as well as *Baxter* was a Trinitarian, yet he did not consider the doctrine of the Trinity as an essential of Christianity.

Mr. *Birch*, in his *Life of Archbishop Tillotson*, writes thus: "The Scriptures were the rule of his faith, the chief subject of all his meditations. He judged that the great design of Christianity was, the reforming men's natures and governing their actions, the restraining their appetites and passions, the softening their tempers and sweetening their manners,

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and the raising their minds above the interest and follies of this present world to the hope and pursuit of endless happiness."

Bishop *Gibson*, in his "Second Pastoral Letter," published in 1735, thus expresses himself:—"It will appear that the several denominations of Christians agree both in the substance of religion and in the necessary enforcements of the practice of it: that the world and all things in it were created by God;" "that *Christ* was a teacher sent from God, and that his Apostles were divinely inspired; that all Christians are bound to declare and profess themselves to be his disciples; that not only the exercise of the several virtues, but also a belief in *Christ*, is necessary, in order to their obtaining the pardon of sin, the favour of God, and eternal life;" "and as to all other points, that they are bound to live by the rules which *Christ* and his Apostles have left them in the holy Scriptures. Here then is a fixed, certain, and uniform rule of faith and practice, containing all the most necessary points of religion, established by a divine sanction, embraced as such by all denominations of Christians, and in itself abundantly sufficient to preserve the knowledge and practice of religion in the world." So that we have the authority of this prelate of the Church of *England* for saying that he did not consider the doctrine of the Trinity as essential to salvation, or that a man was not a Christian because unfortunately he disbelieved it.

The *Bishop of London*:—From what particular expressions of Bishop *Gibson* do you infer that he did not consider the doctrine of the Trinity necessary to salvation?

The *Attorney-general*:—He describes all that he considers necessary, which would include as well

those persons who are Unitarians as those who are not Unitarians.

Lord *Wynford* :—One of those things “ necessary ” is a “ belief in *Christ*.”

The *Attorney-general* :—That he was sent from God, was a divine messenger, worked miracles, preached the word of God, taught eternal life. I am not here in my private capacity, to say that is sound doctrine, or to intimate what is right or wrong doctrine in my own judgment. I only read those extracts to show what was declared by persons to whose opinions the greatest weight is to be given.

The *Bishop of London* :—That passage from Bishop *Gibson*’s Pastoral Letter must, of course, be interpreted with reference to the object of it, which was to persuade all persons to practise religion, by showing that there are some great points on which they agree : but there is not one word in it from which it can be inferred that he did not think the doctrine of the Trinity an essential doctrine of Christianity.

The *Attorney-general* :—He enumerates all those which he considers essential, and the doctrine of the Trinity is not mentioned.

The *Bishop of London* :—For what purpose are all those passages cited ?

The *Attorney-general* :—To show that, although a certain class of religionists who are called Unitarians do not believe in the doctrines of the Trinity, and of original sin and the atonement, still they may be within the description of “ godly preachers of *Christ*’s holy Gospel—”

Lord *Lyndhurst* :—In the sense of those terms at the time the charity was founded ?

The *Attorney-general* :—And to show that, in the

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opinions of Christians of all sects who wrote before and after the founding of the charity, persons were considered Christians, although unfortunately they did not believe in those doctrines. Now will it, in opposition to these venerable authorities, be contended that Unitarians are not Christians, and that a Unitarian preacher who preaches on the divine mission of *Jesus Christ*, on his miracles, on the doctrines that he promulgated from Heaven, and who inculcates the doctrines that *Christ* declared and the precepts which he left for our direction, is not a Christian, or a preacher of *Christ's* holy Gospel?

My Lords, I know not what the Respondents' counsel will contend at your Lordships' bar; but it has been intimated that not only by the Toleration Act, not only by the 9th & 10th *Will.* 3, c. 32, by which the impugning the doctrine of the Trinity is forbidden, but that even at common law this is an offence for which the secular arm may be put in motion. That is a position that I beg most respectfully to deny. Christianity is part and parcel of the law of *England*; and any person who denies Christianity, who denies the divine mission of our Saviour, who denies that the Scriptures contain the revealed will of God, or reviles any of the doctrines of the Church of *England*, commits an offence for which he is amenable to the civil magistrate. But inquiry into the doctrines of Christianity is allowed by the law of *England*; and any person who reverently discusses such subjects may do so with impunity, and it would be persecution to try to molest him. It has been long settled that to deny the truth of the Christian religion is a civil offence; that Christianity is parcel of the law of *England*, and therefore to speak in reproach of it is to speak in subversion of the law; *The King v. Tay-*

lor (q); *The King v. Woolston* (r). But in those cases a distinction is made between attacking Christianity in general, and decently investigating any doctrine of the Christian faith. In *Harrison v. Evans* (s), Lord Mansfield says, "There never was a single instance, from the Saxon times down to our own, in which a man was ever punished for erroneous opinions concerning rites and modes of worship, but upon some positive law. The common law of *England*, which is only common reason or usage, knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been persons prosecuted and punished upon the common law." The same doctrine has been repeatedly laid down by the Judges in our own times; as in the prosecutions against *Carlile* (t) for blasphemous publications, which reviled the *Christian* religion.

I therefore venture to come to this conclusion, that, in the absence of all statute law upon the subject, in construing the deeds by which Lady *Hewley's* charity was established there is no ground whatever for saying that Unitarians are excluded from participating in her bounty. I will now refer to the statutes that are relied upon to show that they must be excluded, even if at common law they might be recipients of this charity. The first statute is the Act of Uniformity (13 & 14 *Char.* 2, c. 4), according to which all clergymen who did not sign the 39 Articles, and conform in all respects to the liturgy of the Church of *England*, by St. *Bartholomew's* day 1662, were to be ejected from their livings; and the celebration of religious worship, except according to that liturgy, was strictly forbidden. But in fact, although such was the letter

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(q) 1 Vent. 293.

(r) Str. 834.

(s) 3 Bro. P. C. 465.

(t) 3 Barn. & Al. 161.

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of the law from 1662 to 1689, it is well known that it could not and was not carried into effect. So much was the law found to be against the feelings of the people, that the Government wisely connived at the celebration of divine worship by Dissenters; and there is no doubt that Lady *Hewley* assisted those who, during that period, violated the letter of the law. That state of things continued until, after the Revolution, the Toleration Act (1 *Will. & Mary*, c. 18) was passed. It was a very qualified toleration, being confined to those Dissenters who should sign the 39 Articles, except the 34th, 35th, 36th, and part of the 20th; and except, as to Baptists, part of the 27th Article. But it was expressly provided by the 16th section of the Act, that no toleration, ease, or advantage was to be extended to any Papist, or to any person that denied the doctrine of the Trinity, as declared in the said Articles: And the subsequent Act of the 9th & 10th *Will.* 3, c. 32, made it positively penal to deny that doctrine by writing or advised speaking.

This was the state of the law when Lady *Hewley's* deeds were executed. Then came the 19th *Geo.* 3, c. 44, by which the subscription to the 39 Articles was entirely dispensed with, and any person was entitled to the benefit of the Toleration Act who could make this declaration:—"I, *A. B.*, do solemnly declare, in the presence of Almighty God, that I am a Christian and a Protestant, and, as such, that I believe that the Scriptures of the Old and New Testament, as commonly received among Protestant churches, do contain the revealed will of God; and that I do receive the same as the rule of my doctrine and practice." Now I would adopt that as a test to try who are Christians, who are to be considered as godly preachers of *Christ's* holy Gospel. I say that any person who can

conscientiously make this declaration is to be considered as believing in *Christ's* holy Gospel, and whatever preacher will make it may be considered as a preacher of *Christ's* holy Gospel.

Lord *Wynford*:—Do the Unitarians believe the Scriptures of the Old and New Testament as commonly received among Protestant churches?

The *Bishop of London*:—Will you undertake to say they receive the holy Scriptures as the Church of *England* receives them?

The *Attorney-general*:—I do believe that the great majority of them do.

The *Bishop of London*:—Have you ever seen their improved version of the New Testament?

The *Attorney-general*:—The improved version is not a test of the faith of Unitarians. An importance has been given to it by the Vice-Chancellor, to which it was not entitled. We are bound to take the faith of Unitarians from themselves. We have it from Mr. *Wellbeloved's* answer, in which the other Appellants of his creed fully concur; and from that answer it is clear that a Unitarian can conscientiously subscribe the declaration which is required by the Act 19 *G. 3*, c. 44. There was, however, still an exception against persons of that faith until by the Act of the 53d *G. 3*, c. 160, all distinction was taken away between Unitarians and other dissenters from the Church of *England*. That Act repeals the exception in the Toleration Act, which was meant to operate against Unitarians; and it repeals the 9th & 10th of *W. 3*, c. 32, which made it penal to deny the doctrine of the Trinity. That being so, the question arises, are we, in respect of these Acts of Parliament, to put a different construction upon Lady *Hewley's* deeds, from that which they would receive if those Acts never had passed?

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It is said that she would not include among the objects of her bounty a sect that was then subject to penalties. While the exception in the Toleration Act continued, and the 9th & 10th of *W. 3* was in force, Unitarians could not derive any benefit from her intention: but when those Acts were repealed, the law was as if those Acts never had existed. A repealed law is to be considered as struck out of the statute book, with reference to all that is to be done after the law is repealed. Lord *Brougham*, in the case of *Bradshaw v. Tasker* (*u*), held, that where there was a legacy left in trust for Roman Catholics before the bill that relieved them was passed, that bill having passed, the trust might be carried into effect. Now, suppose Lady *Hewley* had expressly said, that she left this charity for "poor and godly preachers of *Christ's* holy Gospel *that should be tolerated by law* for the time being," can there be a doubt that when Unitarians were tolerated by law (in 1813), they might then participate in her bounty? But has not she said the same thing in effect? She has said that it was for the benefit of godly preachers of *Christ's* holy Gospel *for the time being*. Does not that clearly mean, "who should be tolerated by law from time to time?" It is asked, was it possible that Lady *Hewley* should mean to do anything for the benefit of those who had the arm of the law suspended over them? Why, my Lords, Lady *Hewley*, according to the representation of the relators, had been violating the law from St. *Bartholomew's* day 1662, till the Toleration Act passed, in 1689. She was in the daily habit of assisting Dissenting ministers whose preaching was penal, and who might any day have been indicted for holding an unlawful assembly. The very expression she

(*u*) 2 Myl. & K. 221.

uses, "for the time being," strongly intimates that she wished to make her benefaction as extensive as possible, and that, if the restrictions existing at the time she founded this charity should be removed, her bounty might expand with the increasing liberality of the law. Your Lordships will observe, that until the year 1779, no one could lawfully be a Dissenting teacher in this country, who did not sign the 39 Articles, except three and part of a fourth. They were all guilty of a misdemeanor, liable to the penalties in the Uniformity Act, if they met in a religious assembly and worshipped God according to their consciences, if they had not signed those Articles. Well, was that put in practice? Will any one say that, even in Lady *Hewley's* time, the Nonconformist ministers did comply with that requisition in the Toleration Act? That Act never was enforced. It would have been found intolerable, if any attempt had been made to enforce it. Lady *Hewley* well knew that the Presbyterian and Baptist and Independent ministers, who were to share in her bounty, were daily violating the law. They received licences at the quarter sessions for their places of worship; but they did not subscribe the Articles, in the manner required by the letter of the law. But still, until the year 1779, they were bound to do so, and were subject to penalties for the omission.

My Lords, for these reasons, I submit that, upon a proper construction of these deeds, whether you construe them with or without regard to the statutes, Unitarians are not excluded from the description of "godly preachers of *Christ's* holy Gospel." I may further contend, if it be necessary, that even if you were to look to the private opinions of Lady *Hewley*, and give a different construction to her deeds in

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respect of those opinions, this decree cannot be supported. It is proved that she was a Presbyterian; there is not sufficient proof that she was a Trinitarian. But suppose she had been a Trinitarian, does it necessarily follow that she intended to exclude from the benefit of her charities all who were not of the same religious belief with herself? There is no doubt that the Presbyterians at one time were devotedly attached to creeds and tests and forms of belief. It was so, and is so, in *Scotland* to this day. The *English* Presbyterians, in the middle of the 17th century, were equally rigid. But after *St. Bartholomew's* day, when they had fallen into adversity, they adopted very different sentiments. Being persecuted themselves, they ceased to foster tests that would countenance persecution, and they were hostile to all creeds and confessions. Believing, as many of them did, in the orthodox doctrine of their fathers, they still had a latitudinarian tendency to admit within the pale of their communion persons who might differ from them in very important doctrines. They allowed open communion; and that is the great distinction between them and the Independents, who were much more rigid, and denied the propriety of open communion, and would allow none to communicate with them except those who were precisely of the same faith with themselves. It was upon that point mainly, that in the beginning of the 18th century those two sects of religionists differed. In the middle of the preceding century, they had indeed differed on questions of discipline. The Presbyterians were for an established church, with a gradation of courts, and a strict system of discipline. The Independents, who were called Congregationalists, were against any such establishment, and held that each congregation formed

a church in itself. In the beginning of the 18th century, the difference with regard to discipline had subsided; but with regard to the question of having a test of religious belief, they were entirely at variance. Lady *Hewley* belonged to the Presbyterians of the more liberal cast; and it might be easy to show that the Presbyterians, when they were most orthodox, were for a comprehensive system that might admit within the same communion persons who materially differed from them. There is no ground for saying, that although Lady *Hewley* herself might be a Trinitarian, she had made up her mind that none except those who believed in the doctrine of the Trinity should participate in her bounty. I submit therefore, that, even if you were to travel out of the deeds, and to construe them according to her private opinions, there is no ground for saying that they ought to receive this limited and narrow construction which the decree of the Vice-Chancellor puts upon them.

I now come to the removal of the trustees, which is a distinct branch of the decree. It may happen to be correct with regard to the objects of the charity, and yet not be capable of being supported as to the removal of the trustees. I say the trustees are improperly removed, first, because there is nothing to show that the objects of the bounty of Lady *Hewley* may not be Unitarians; secondly, even supposing that the objects of her bounty must not be Unitarians, there is no ground for contending that the trustees must be of the same religious opinions with herself, or that they must be of the same religious opinions with those who are beneficially to participate in the charity. According to the language that she employs in directing how the trustees are to be elected, they are to be elected according to the judgment and conscience of

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the survivors, without any qualification whatever with regard to religion. If she lays down no such qualification, what right has a Court of Equity to superadd to this deed what she has not expressed? It would have been easy for her to have said that the successors to her trustees should not be Unitarians. She has said no such thing, but it is said by the Respondents that those who are to administer the charity must, as a rule of law, be of the same religious persuasion with those for whose benefit it is created. I cannot find any such rule of law, or any decision or *dictum* to that effect. The Lord Chancellor is not required to belong to the Church of *England*; he cannot be a Roman-catholic, but he might belong to the Church of *Scotland*, or be a Protestant Dissenter; yet he has to administer all the charities of the country, and to advise the Sovereign upon many important points in which religion may be concerned. So also the Secretary of State for the Home Department advises Her Majesty with regard to the appointment of the clergy in the Church of *Scotland*, where any vacant living is in the gift of the Crown; and I believe one-third of such livings are in the gift of the Crown. The Secretary of State for the Home Department has generally been a member of the Church of *England*. Sir *Robert Peel* was Secretary of State for a good many years. He most undoubtedly had, practically speaking, in his hands the patronage of all those livings. That patronage was most usefully and beneficially exercised by him, his maxim being *detur digniori*; yet Sir *Robert Peel* was and is an Episcopalian; not a Presbyterian, not a member of the Kirk of *Scotland*. I defy the Respondents to point out any rule of law or decision by which this House, or any Court of Law or Equity, has held that trustees of a different

religious opinion, either from the founder or from the objects of a charity, must for that reason be removed ; yet it was for this reason alone that the Vice-Chancellor ordered these individuals to be removed ; and when Mr. Baron *Alderson* came to advise Lord *Lyndhurst*, he considered that it depended entirely upon that question whether they should be removed or not.

What ground is there for saying that anything is either admitted or proved against these individuals, on account of which they ought to be removed from their office ? I have read the answer of Mr. *Wood* already. Mr. *John Pemberton Heywood* says, " That he has always professed himself to be a Dissenter of the Presbyterian denomination : that his ancestors for many generations professed the Presbyterian religion, and in that religion he was brought up, and has held the same faith, which he has never changed or deviated from : that he holds no doctrines which are not received, as he believes, by all the moderate and respectable part of the Church of *England* : that he has from his earliest infancy been taught the Lord's Prayer, the Apostles' Creed, and the Ten Commandments, which appear also to have been the foundation of the faith of Lady *Hewley* : that he has read the works of his ancestor, *Oliver Heywood*, who in the information is mentioned as the friend of Lady *Hewley*, and who was, as he himself states, very intimate with her, and he cannot find any material difference between the faith of *Oliver Heywood* and his own : that he was educated at *Cambridge*, where Dr. *Paley* was his tutor, and from the many conversations he had with him, he can safely assert that there was little or no difference in their religious opinions : that his ancestors have been, for more than a century, members of a congregation which met at *Westgate*,

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in *Wakefield*, who have always been called, by themselves and other persons, Presbyterians, till by the relators they were called Unitarians: that the said congregation have not adopted the name of Unitarian, nor do they, according to the best of his belief, hold any of the obnoxious tenets attributed to them by the relators: that he has attended, and so did his father attend, the Established Church occasionally, to which he has always been friendly, and where he has frequently communicated, though he still continues to frequent and subscribe to the old Presbyterian congregation aforesaid: that he is about 75 years old; has practised as a barrister for 50 years; has acted as a justice of the peace for near 30 years; has lived on good terms with all his neighbours; and is, he humbly submits, not unworthy to be a trustee of a charity, the object of which is to distribute money among poor godly preachers of the Gospel, and to poor widows, and to other poor persons."

Mr. *Peter Heywood*, his son, says, "That he has been brought up in the same religious opinions; educated at *Cambridge*, and took his degrees there, and is still a member of *Christ's College*, in that University: and that he attends the Established Church more frequently than any other place of worship; and that he is not a member of any Unitarian congregation." But he shares the fate of his father, and is, like him, removed from the office of trustee. And so is Mr. *Palmes*, and also Mr. *John Wood* who had been elected a trustee after the information was filed. Where is there any misconduct with which they can be charged? It is not pretended that they have embezzled the funds. No corruption is hinted against them; it is not pretended that they have not properly managed the estate. Then what is

the head and front of their offending? That, there being 237 recipients of the charity, they have continued to pay the same allowances as had been done for 50 years to 37 of them, who are called Presbyterians, and who are supposed now to have adopted Unitarian doctrines; because they did not inquire whether those congregations had not changed their faith; because they did not catechise them, and did not stop the supplies when they found that they were not orthodox. This may be improper. The trustees submit that they may have fallen into a mistake; they are fallible, and they submissively present themselves to receive proper directions. They all say that they acted conscientiously, and according to the best of their judgment; but they are perfectly willing, as they say in their answer, to administer the charity upon any principle that the Court shall lay down and direct. They are blamed that, there being five exhibitions, four of those go to *Manchester* College at *York*. That is the only place for training ministers that are intended for Presbyterian congregations in the north of *England*. It is an institution which has subsisted for a long course of years. The exhibitioners go there for the purpose of instruction. They are not at that place necessarily Unitarians. The advice that is given at that college by the theological professor to his pupils is this: "In all their studies and inquiries of a religious nature, carefully and conscientiously to attend to evidence as it lies in the holy Scriptures, or in the nature of things and the dictates of reason; cautiously guarding against the sallies of imagination and the fallacy of ill-grounded conjecture: to assent to no principle or sentiment taught or advanced, but only as it shall appear upon the fullest examination to be supported by Revelation: to labour to banish

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from their breasts all prejudice, prepossession, and party-zeal: to study to live in peace and love with all their fellow Christians; and steadily to assert for themselves, and freely to allow to others, the inalienable rights of judgment and conscience." Is not this all in the true spirit of the Protestant religion; that those who are trained to the ministry should read the Scriptures, as containing the revealed will of God, and from those Scriptures to learn the will of Heaven?

For these reasons, I say there was no ground for removing any of the trustees; that mere difference of belief could not be a sufficient ground; that there is no misconduct charged; and that, with regard to religious belief, as far as the Messrs. *Heywoods*, Mr. *Wood*, and Mr. *Palmes* are concerned, there is no pretence for saying that they are to be removed as Unitarians.

Another ground upon which this decree must be reversed, or at least altered, is, that it merely excludes a certain class from the benefit of the charity, but does not declare who shall have the benefit of it. It excludes a certain class from being trustees, as being disqualified, but does not declare what shall be the qualification of a trustee.

What has been the consequence of this omission in the decree? That there have been claims made by the Independents in the Master's office: those claims are met by the Presbyterians of the Church of *Scotland*, who say, the Independents are not of the religion of *Lady Hewley*; that she would have been shocked at the idea of an Independent partaking of her bounty, because she thought that Presbyterian discipline was an essential part of the Church of *Christ*, and therefore Independents should not be allowed to be trustees or to participate in her bounty. Then, another set of claimants come forward, who say that they are of the

Secession Church; that they are orthodox Trinitarians, but that they are not in connexion with the Church of *Scotland*; and therefore they ought to be preferred. The Master is totally at a loss whom to appoint trustees, or what rule to lay down with regard to the administration of the charity, until your Lordships shall reform this decree, and supply its omissions. But it may be said that the information only prays that the present trustees shall be excluded. I can show, according to undoubted authority, that the Court is not merely to look to the prayer of the information, but that in a charity case it is to do, *ex officio* and *mero motu*, all that is necessary for the due administration of the charity. In *The Attorney-general v. Jeanes* (x), it was said by Lord *Hardwicke*, "That in an information by the Attorney-general for the regulation of a charity, it is the business of the Court to give a proper direction as to the charity, without any regard at all to the propriety or impropriety of the prayer of the information." And again, in *The Attorney-general v. Scott* (y), he says, "As to the information, that is not to be dismissed, whether what is prayed is properly prayed or not; for though the particular relief prayed is wrong, the information by the Attorney-general is not to be dismissed if that charity wants any direction." In *The Attorney-general v. The Mayor of Stamford* (z), the relief which was prayed by the information was refused, but still the charity was established; and so also, in the case of *The Attorney-general v. Brooke* (a), Lord *Eldon* says, "the rule in cases of charity is almost, that the general prayer is sufficient, and the Court will give the relief adapted to the case."

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(x) 1 Atk. 355.
 (y) 1 Ves. sen. 418

(z) 2 Swanst. 591, Appendix.
 (a) 18 Ves. 324.

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Now, what is the relief adapted to this case? If the opinions of Lady *Hewley* be the test, no trustees shall be chosen who do not entertain the same opinions; and hereafter, none shall be permitted to be the recipients of her bounty except those who entertain those opinions. But at present the Master knows this test only negatively with regard to two doctrines; original sin and the atonement; but he does not know it affirmatively with regard to many of the others; so that the charity cannot be administered if this decree is simply affirmed: the very next day there must be another information filed, there must be other relators discovered, and an application must be again made to a Court of Equity to supply the deficiencies under which the decree labours.

The Vice-Chancellor begins his judgment by referring to the will of Sir *John Hewley*. What effect could that will have upon the construction to be put upon deeds executed by Lady *Hewley* long after Sir *John's* death? His Honor reasons thus: Lady *Hewley* was the wife of Sir *J. Hewley*; Sir *J. Hewley* was a Trinitarian, a believer in the Trinity, and therefore Lady *Hewley* must have been the same; and Lady *Hewley* being a Trinitarian and a believer in the doctrine of the atonement, I will put a different construction upon her deeds from that which I should have done if she had been of a different religious persuasion. His Honor then refers to her own will, which is no part of the case by which this foundation is established. There is no reference in the deeds to her will, nor in her will to the deeds. He then goes on to Dr. *Colton's* will, and reasons that, as he was her minister, all the doctrines he believed, she must likewise have believed. He then comes to *Bowles's* Catechism, which I allow was a fit subject to be taken

into consideration. Then, having made out that she was a Presbyterian, he proceeds to consider what are the doctrines of the Presbyterians, and appeals to the testimony given before a Committee of the House of Commons in 1825, on the state of *Ireland*, by a Presbyterian minister from that country; and collecting from that evidence what the religious doctrines of the *Irish* Presbyterians are now, his Honor assumes that they were the same doctrines that were held by Lady *Hewley* in the year 1704. It is well known that the Presbyterians of the north of *Ireland* are a branch of the *Scotch* Presbyterian Kirk, and adhere to the tests and forms of faith of the church from which they spring. How can these doctrines, at this day, afford any proof of the habits of the *English* Presbyterians in 1704, or of the intentions of Lady *Hewley* in executing these deeds?

But the Improved Version of the New Testament forms the grand feature in his Honor's judgment. That book had been offered in evidence by the relators, and was withdrawn on being objected to as inadmissible; yet his Honor made it the chief ground of his judgment. The only connexion the Appellants had with that version, as his Honor admitted, was that three of them happened to be members of an association in whose prospectus, or catalogue of books, that translation of the Testament was named. But that version of the Testament is not used in any Unitarian congregation in *England*. The version used by the Unitarians is the same that is used in the cathedrals and churches of *England*, the translation of the Bible in the time of *James* the First, authorised by law. There is no proof that any of these trustees approved of the new version. Any of your Lordships, though perfectly orthodox, may have subscribed to a library

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or club in which there may be books containing heretical doctrines, perhaps a translation of the Koran, without incurring the suspicion of being heretics or Mahometans.

My Lords, the question here is, are those who deny the doctrines of the Trinity and of original sin, Christians, or are they not? Are they supposed to deny the Christian religion because they do not believe in those peculiar tenets? If they are not Christians, on account of that unbelief, they are guilty of a misdemeanor; because, Christianity being parcel of the law, to deny anything which amounts to a denial of Christianity, is a misdemeanor. Those defendants being interrogated on those particular tenets, if their acknowledgment that they did not believe in them amounted to a denial of Christianity, were not bound to answer. When that matter came before the Lord Chancellor, it was contended on two grounds that they were not bound to answer: first, that the private belief of a trustee is not to be inquired into, that the Court is to see whether he properly exercises the duties of a trustee, and that it would be dangerous to put him on his oath to declare what are his opinions on any particular doctrinal question; secondly, that if the doctrine contended for on the other side of the bar prevailed, namely, that at common law, to deny the divinity of our Saviour was a misdemeanor, they would subject themselves to penalties if they confessed that that, which was stated, was their belief.

But after full deliberation, both objections were repelled, and the noble and learned Judge who had heard the argument decreed that Mr. *Wellbeloved* and the other defendants were bound to answer, because the avowal of those doctrines would not subject them to penalties. This proves that in the view of

the Court, the Unitarians, although they may be heterodox and erring Christians, are Christians; and that they are to be acknowledged by us as our Christian brethren.

I come now to what took place when judgment was given by Lord *Lyndhurst*. He had the assistance of Mr. Baron *Alderson* and Mr. Justice *Patteson*. Mr. Baron *Alderson* delivered the opinion of both. Lord *Lyndhurst* having, in giving his judgment, proceeded on the principle that regard is to be had to the private opinions of the foundress in interpreting the foundation deeds, says that doctrine is established by the case of *The Attorney-general v. Pearson (b)*. Now on looking into that case, the House will find that nothing was decided in it that can justify the position that, where there are formal deeds founding a charity, and expressing fully the wishes and intentions of the founder, the construction to be put upon the deeds is not to be applied to what appears on the face of them, but to what can be gathered from an inquiry into the private opinions of the founder *dehors* the deeds. No such doctrine is to be deduced from that case.

My Lords, I have, lastly, to call your attention to the matter of costs, which Lord *Lyndhurst* refused to allow to the Appellants out of the trust-funds; and that is another point upon which I am justified in saying that his order affirming the decree ought not to be supported. Where there are charity informations, unless there is some serious misconduct to be ascribed to the trustees, the invariable practice is that their costs are paid out of the charity fund. Such was the rule adopted by the Vice-Chancellor. He thought that no misconduct could be imputed to those trus-

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tees; he therefore allowed their costs to be paid out of the fund; himself recommending an appeal. There was an appeal. Was that appeal wrong? Were the trustees to be blamed for appealing in a case of such magnitude and such difficulty, and when the decree, right or wrong, proceeded chiefly upon that which ought not to have been any ingredient in the decree, namely, the "Improved Version" of the Scriptures? Under all these circumstances, can it be said that these trustees did wrong in appealing from the decree of the Vice-Chancellor, and praying that it might be reviewed by the Lord Chancellor? If they were not wrong in taking the opinion of a higher Court in a matter of such difficulty and peculiarity, then it was wrong to throw upon them the costs which they thereby incurred.

My Lords, for these reasons, I hope that this decree will be entirely reversed, that the information will be dismissed, and that your Lordships will come to the conclusion that there was no ground for it whatever. If your Lordships should not be of that opinion, then I call upon you to revise the decree with respect to the objects of the charity, who are to receive eleemosynary relief; to revise it with regard to the condition that is now put upon the introduction of almswomen, that they must believe in the doctrine of the Trinity, no such condition being imposed by the will of the foundress. I call upon you likewise to revise the decree in this respect, because on account of its omissions and defects it cannot be carried into effect. It is impossible, if it were to stand, that we could know who are to be excluded, and who are to be included. I likewise trust that your Lordships will consider that question with regard to the costs, and relieve the trustees from that which I consider a great injustice, that

they should be saddled with costs, having been guilty of no misconduct.

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The *Solicitor-general*, on the same side:—Since the decree in this case has been pronounced numerous informations of the same kind have been filed or threatened, and now wait the decision of the House on this appeal. These informations have for their object to unravel questions that have been considered as settled for above a century, and to disturb charities which extensive societies have been long enjoying in conformity, as they supposed, with the law.

The principal question in this case may be put thus: Suppose *Lady Hewley* had died the day after she executed the deed of 1704, and that nothing was known of her except as being a party to this deed founding the charity, how would it be construed? Clearly, on all rules and principles of law, it could be construed in no other manner than by looking to what is contained within the four corners of it. I am not receding from that proposition by admitting that regard might be had to the circumstances under which it was executed, that all the circumstances surrounding the foundress at the time might be looked to in order to know what she knew, and to ascertain the meaning, at that time, of the words she used; and whether the meaning of the words “godly preachers” in this deed be ascertained by the evidence of witnesses conversant, from their reading, with the application of those terms in the year 1704, or your Lordships discover it by reading books and documents of that date, is wholly immaterial. In either way your Lordships will see that the Nonconformist ministers were, from the time of *Charles 2*, called “godly preachers,” as distinguished from preachers of the

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Established Church; indeed the term “preachers” was never applied to the clergy of the Church of *England*, who made more of the liturgy and the services of the church than of preaching.

The evidence given by the relators on this point is that the terms “godly persons, and godly ministers, or godly preachers,” were adopted or employed in the conversations and writings of the times (the time of *Lady Hewley*), “for the purpose of designating Dissenters and Dissenting ministers generally; that the said terms were used for the purpose of distinguishing Dissenting ministers and preachers from those of the Established Church; for ministers of the Church of *England* would have regarded it as a slur to have been called preachers at all, the liturgy being with them considered more important than preaching, while the Dissenting ministers had no liturgy, and considered the preaching of the Gospel as their most important duty; and the dissipation into which the nation ran after the Restoration caused the Nonconformists to be branded with the term ‘godly’ by way of reproach.” I assent to that distinction, and in order to make the matter more clear, I would add “Protestant;” because it is quite clear that the trusts of the deed were confined to Protestant Dissenting preachers and persons. Suppose the objects of the charity were described in the deed by the words, “such poor Protestant Dissenting preachers for the time being of *Christ's* holy Gospel, and such poor and godly widows of Protestant Dissenting preachers,” &c., and that nothing further was known of the foundress than that she had executed the deed, and that there was nothing to explain the words used by her, would not the words be held to mean, Protestant Dissenting preachers, preaching *Christ's* holy Gospel in any form tolerated by law for the time being? The Respondents would

restrict the meaning of the terms to the preaching of such doctrines only as were tolerated by law at the time of the execution of the deed. Why should so narrow a construction be put on the words "for the time being," which by themselves are capable, with the law, of being extended or narrowed as circumstances might require?

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What were the doctrines that were tolerated at the date of this deed? By the Toleration Act and the Act of the 9th & 10th *Will.* 3, c. 32, it was lawful, for any Protestant Dissenting minister, subscribing to 36 of the Thirty-nine Articles, to preach any doctrines not denying the Trinity or the Christian religion or holy Scriptures; so that when *Lady Hewley* executed this deed, it may be properly said that it could contain no trust for the benefit of any person who by *writing or teaching impugned* the Trinity. It might be difficult to say that it contained no trust for a poor person who did *not believe* the Trinity, because that is not part of the statute; but there certainly would be no trust in favour of a person *preaching* against the Trinity; there would be no trust in favour of a person who did not subscribe the Thirty-six Articles; that is equally clear; because to preach Dissenting doctrines, not having subscribed the Thirty-six Articles, was legally penal.

The law remained in that state until the year 1779, when by the Act 19 *Geo.* 3, c. 44, scrupulous Protestant Dissenting preachers, on subscribing the declaration there mentioned, were relieved from subscription to the Articles. Can it be contended that after the passing of that Act, such preachers did not come within the scope of *Lady Hewley's* charity, although at the time she executed the deed, they, not subscribing to the Articles, were not within the mean-

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ing of Protestant Dissenting preachers of *Christ's* holy Gospel? If that be held to be the law now, there is no fit object of Lady *Hewley's* charity, for there is not a Dissenting Protestant preacher in the kingdom who subscribes the Thirty-six Articles; wherefore your Lordships must execute this charity *cy pres*; and in that case, I quite assent to what has been suggested out of this House, by one of your Lordships, that the clergy of the Church of *England* have much the fairest claim; they do subscribe—

Lord *Brougham*:—I threw that out for the consideration of the parties twice, in the Court of Chancery; I suggested that they had better take care that the Attorney-general's hand did not come in upon them. I remember stating that I knew that to be the opinion of a number of learned divines upon the subject.

The *Solicitor-general*:—If it be contended that the subscription to the Articles is now, as it was in Lady *Hewley's* time, a necessary condition to the reception of her bounty, I must own that it appears to me the Church of *England* has a fairer claim than any of these contending parties, as none of them subscribes the Articles. But I must assume that it is the opinion of the House that, after the Act of 1779, the benefits of the charity were not confined to persons subscribing the Articles, as by that Act it ceased to be a violation of the law to preach without subscribing to them; and therefore parties otherwise qualified, might be entitled to participate in the charity, although they did not subscribe to the Articles. Then, if that be fair and legitimate reasoning, as I submit it is, does it not follow that when the prohibition against preaching against the Trinity was removed by the subsequent statute of 53 *Geo. 3*, c. 160, all Protestant

Dissenting preachers came within the description of "godly preachers of *Christ's* holy Gospel?" They are certainly preachers tolerated by law for the time being; and preaching doctrines tolerated under the statutes to which I have referred, why should they be excluded on the ground that they teach doctrines that were unlawful at the creation of the trust?

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The proposition of the Appellants is, that all Protestant Dissenting preachers who became tolerated by law, from time to time, are now within the operation of this trust. It is impossible to produce any decided case exactly in point, in support of that proposition, but various analogous cases may be suggested: Suppose a charity-trust to be now created, whereby a party grants land to be cultivated by poor persons for their own benefit, and next year it should be rendered lawful to cultivate tobacco in this country, which is unlawful now; after the repeal of the laws prohibiting the cultivation of tobacco, would it not be a due execution of this trust to let the land be used for the cultivation of tobacco? Certainly it would; but the author of the trust would not have so meant. He meant that that which was to be done was to be legal; but if he has not, in terms, excluded the cultivation of tobacco, it must be inferred that the only reason why it was excluded, was because the law said it was not lawful; and when the law ceases to say that, then it becomes lawful to use the land in the cultivation of tobacco.

Suppose a party, in 1830, established a market to be used gratuitously or upon easy terms, by parties coming to it, and that they were to come now and sell game there, is that use of the market within the trust? It certainly was not what was meant; it was never meant to create a trust for the benefit of parties selling game; but the words of the trust have not ex-

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cluded persons from selling game. The grantor used expressions constituting this a market, at the time it was not lawful to sell game; but when it became lawful, the selling of game in the market became as much within the trust as the selling of any other article within it. So in the time of Lady *Hewley* it was not lawful to preach Unitarian doctrines. She created a trust in favour of persons who should preach what I must interpret to mean tolerated Protestant Dissenting doctrine; but Unitarianism was not tolerated Protestant Dissenting doctrine; therefore there was no trust enabling parties to preach Unitarianism. Subsequently it becomes lawful; then the generality of the words lets in all those who preach whatever is, for the time being, the tolerated doctrine that may be preached.

There was among the ferocious penal statutes that were passed in the reign of *Charles 2*, an Act "for restraining Nonconformists from inhabiting Corporations:" and it was enacted that the parsons, vicars, curates and other persons in holy orders, or pretended holy orders,—that is, the ejected ministers,—should not be allowed to inhabit corporate towns, or within five miles of corporate towns. Suppose, after the passing of that Act, and while it was in operation, somebody had created a trust for the benefit of the inhabitants of a particular corporate town; was that a trust created for Dissenting ministers in those corporate towns? Clearly not. Protestant Dissenting ministers could not bring themselves within the class that were to claim the benefit of that trust. But would any Court or Judge say now, that any individuals having to execute a trust of that sort, must inquire whether any of the recipients are Dissenting preachers or not? Your Lordships see that those inquiries would lead to a most alarming extent. What I have now stated

hypothetically, must have occurred in fact. It is impossible to foresee what inquiries may become necessary for the execution of trusts created in remote times, if the Courts, instead of interpreting the words of trust according to their meaning in existing circumstances, will endeavour to ascertain not only what was the state of the law as to religion, but what were the feelings and opinions of the party creating the trust, as evidenced by the state of the law at the same period. Such inquiries I apprehend to be inadmissible; and even if the private opinion of a party founding a charity could be clearly ascertained *dehors* the deed of trust, that knowledge cannot be applied to regulate the distribution of the charity. To adopt that course would be—what every lawyer knows cannot be done—to attempt to find out by extrinsic evidence, not what the author of the trust said, but what she meant to say. It is proper to remind the House that the deed of 1704 has no reference whatever to any religious opinions, except so far as they are to be gathered from the expression “godly preachers of *Christ’s* holy Gospel,” and from the state of the times in which that deed was executed.

The next deed is that of 1707. Where two deeds are executed at the same time, or so as to form one transaction, it is not any deviation from the principle of law, which compels you to find the meaning of the deed within its four corners, that you may look at the concurrent deed to explain the other; and if, therefore, this deed of 1707 was any part of the same transaction as the deed of 1704, you might perhaps have looked at it to explain the deed of 1704. Certainly, if it be lawful, in the construction of these deeds, to inquire by matter extrinsic what the religious opinions of Lady *Hewley* were, you may look at the deed of

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1707 as a test of her opinions at that time ; and the presumption will be irresistible that they were the same in 1704. Now, how do we find out what were her opinions in 1707 ? That deed, though made between the same parties as the former deed, does not in any instance allude to that former deed ; but it conveys to the same trustees property, and amongst other, the almshouse in *York*, which she directs shall be used by them as an almshouse for poor people ; that they were to provide catechisms, and give 60 *l.* among ten poor women upon the first day of every almanack month. Then, having so provided for the almshouse, she directs the surplus to go,—she does not say, in the same way as directed in the former deed,—but she declares the trusts of it, which are the same as the trusts of the former deed, that is, to “godly preachers,” and so forth. In 1709, there is an indorsement upon this deed by Lady *Hewley*, directing that the management of the almshouse, as to the putting in the poor people upon any vacancy, shall be in the power of the within-named *Thomas Colton* and six others. Then there are two sets of rules left by her, and referred to in the deed ; the first set to be observed by the trustees, the second to be observed about the qualifications of the poor people to be elected into the almshouse ; and by these she directs the almspeople to be such as can repeat, among other things, the Creed and *Bowles's* Catechism. Now, there is no test of that kind applied by the deeds to the “godly preachers.” Was that an intentional or accidental omission ? The deeds were prepared with elaborate care ; that is stated by the Respondents ; yet neither in the deed of 1704, nor in the direction for the application of the surplus of the rents, after providing for the almshouse, in the deed of 1707, is there any such test applied to the

other objects of the charity ; but the trust is a second time declared to be for " poor and godly preachers," &c. It is only in the rules for the government of the almspeople that Lady *Hewley* directed them to repeat the Creed and catechism ; and because she gave that direction, it is inferred on the part of the Respondents that she was a Trinitarian. Now, suppose Lady *Hewley* had said in terms that *Bowles's* Catechism contained her faith. If that catechism is examined, no passage can be found in it inculcating the doctrine of the Trinity. The shorter catechism of the Assembly of Divines clearly inculcates that doctrine ; that was the catechism that was then in general use ; yet Lady *Hewley* did not direct it to be used in the almshouse. What is the natural inference, then, to be drawn from her recommendation of *Bowles's* Catechism ? Clearly that she did not make a belief in the doctrine of the Trinity a qualification even for the almspeople, and that she did not herself believe in that doctrine, although she may have believed in the doctrines of original sin and the atonement, both which are indirectly inculcated in *Bowles's* Catechism. Belief in these doctrines does not necessarily imply belief in the Trinity. Many learned divines and laymen believed in the Trinity, but not in original sin, and *vice versa*. But supposing Lady *Hewley* to have believed in the doctrines of the Trinity as well as in original sin and the atonement, I submit that there is nothing within the four corners of the deeds, nor in the state of society at the time they were executed, that would lead to the inference that she meant to make a conformity to her own religious belief a condition precedent on the part of those who were to receive her bounty. It still therefore remains for your Lordships to decide this important question, whether, having

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regard, first, to the mode in which it is competent to Courts of Justice to construe deeds, and, secondly, to the state of society and of religious dissent at the time when those deeds were executed, you can travel out of the plain, unequivocal words contained in them, under the supposed notion that Lady *Hewley* meant to impose a test of faith,—whether you can, although you find nothing imposing any such test in the words of the deed, and find nothing whatever in the state of society at the time when the deed was executed, to lead to the inference that she meant more than is to be found in the words of those deeds,—whether you can say, We will infer of necessity that she meant nobody to participate in her charity that did not entertain opinions conformable with her own? That is the important question which is to be decided, and which, in whatever way it be decided, your Lordships will feel is one of as great importance as ever has been submitted to this House.

It remains for me to make some observations upon the decree which has been pronounced. If the view which I have taken of the subject be correct, then it would follow that there should have been no decree pronounced at all, but that the information should have been dismissed. If that view were adopted by your Lordships, any observations as to whether the decree be a correct decree would of course be irrelevant. But, whatever confidence I may have persuaded myself to feel in the view that I have already submitted, I cannot think that I should be doing my duty if I did not show to your Lordships that even if a decree was to have been pronounced, this was a decree that never can stand. Suppose your Lordships shall be of opinion that some directions are necessary for the administration of this charity, I beg leave to

ask how the directions given in this decree are to be carried into effect? The Court declares that “ministers or preachers of what is *commonly called Unitarian* doctrines, and their widows and members of their congregations, and that persons of what is *commonly called Unitarian* belief and doctrine, are not fit objects” of Lady *Hewley’s* charities. Never was there a decree so worded. Who can act on “what is commonly called?” Commonly called! By whom? Is the same thing which *A.* calls Unitarian belief, so called by *B.*? Have your Lordships judicial knowledge on the subject? Referring to the evidence in the cause for all the knowledge your Lordships have of the subject, you will find that Mr. *Wellbeloved*, who is closely interrogated on it, says, “There is a great diversity of opinion among persons professing Unitarian opinions, and there is among them no settled or admitted standard of belief, save the holy Scriptures.” “There are very few persons who agree in the definition of the term ‘Unitarian,’ and sects maintaining very different religious opinions claim it for themselves; and this defendant says he does not agree in some very important points of doctrine with every sect that either takes to itself or receives from others the appellation of ‘Unitarians.’” Yet this decree, without having ascertained what constitutes a Unitarian, declares negatively that persons entertaining Unitarian belief and doctrine are not fit objects of the charity. That, it is true, is what the information prays; and for this reason, it is presumed, because Unitarians are by some persons held not to be Christians. A disbelief in the holy Scriptures would be a test for ascertaining who are persons entertaining Unitarian belief and doctrines. But that is not the test; for Mr. *Wellbeloved* says, “They so believe in the divinity

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of the mission and office of the Lord *Jesus Christ*, and that the holy Scriptures of the Old and New Testament contain the revealed will of God." The information does not allege that they are not Christians: on the contrary, it speaks of them over and over again as Christians, and it charges "that the belief and doctrines of the class, &c. of *Christians commonly called Unitarians* are set forth in several of the books circulated by the British and Foreign Unitarian Association." Are the books circulated by that association to be the test for ascertaining who are Unitarians? That they were meant to be the test, may be presumed from the importance that was attached in the Court below to the book called the "Improved Version of the Scriptures," which is one of the books found in the catalogue of those circulated by that association, as appeared by the extract from their sixth report of their proceedings; which was put in evidence, no doubt, for that purpose, and to show that some of the Appellants are members of that association. Now it is a most startling proposition, that because one subscribes to a society having for one of its objects to print and circulate cheap books of controversial divinity, he is therefore to be presumed to know and approve everything contained in all those books. As well may any right reverend Prelate in this House, and the whole University of *Cambridge*, be held to be Mahomedans for having sanctioned the printing of *Sale's Koran*. There is not a particle of evidence that this "Improved Version" was ever adopted by the Unitarians. Indeed the Appellants say that it is not received by any congregation of Unitarian Dissenters; that it is never regarded by them but as a book of controversial divinity; that it is never used in their churches, nor much referred to in their studies; and that, for gene-

ral fidelity as well as beauty, they prefer and use the authorised translation of the Bible. Yet this book—not this book even, but the belonging to an association that circulates it—is to be made the test that is to be applied for finding out persons “of what is commonly called Unitarian belief and doctrine!” How can the Master in Chancery, or the trustees appointed by him, determine whether a preacher or other person entertains what is commonly called Unitarian belief and doctrine?

The decree declares that persons of what is commonly called Unitarian belief and doctrine are not fit objects of the charity, and there it stops. It is to be remembered the course of this decree is merely to state that Unitarians, or rather persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the charity, and there it stops. It is also to be borne in mind that there is a very large fund in Court, which at the time of the decree was upwards of 10,000 £, and now is 30,000 £. What is done with that? It is ordered, “That it be referred to the Master to approve of a proper scheme for the application of the residue of the funds of the said charity.” What course is the Master to take? He is told that persons holding what is commonly called Unitarian belief and doctrine are not fit objects. This is not a mere question between the relators and the defendants, the trustees. The parties really interested are the individuals throughout the whole kingdom who may be objects of this trust. Well, is the Court to leave it all at sea, and say, “We find it very difficult, and all we say is that Unitarians shall not have it, and you, the Master, must find out as well as you can who is to have it?” Is that the way in which the Courts are in the habit of dealing with decrees? That is

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not the view that Lord *Eldon* adopted in the case of *The Attorney-general v. Pearson*; he did not think that, because there was difficulty in it, he was to leave it to chance, and let anybody that could catch it. What he did is not analogous in the present case, but still it is analogous to my present argument, that the Court is to exhaust the subject, and see what is to be done, and not merely what is *not* to be done. Following out that principle, which your Lordships must do, if you come to the conclusion that *Lady Hewley's* opinion, and conformity to *Lady Hewley's* opinion, is to be a test of our right to receive the fund, you must direct a reference to the Master, to inquire what were the tenets of *Lady Hewley*, and what were the tenets and doctrines of the persons whom she intended to benefit by her bounty. Without that, it is utterly impossible that this trust fund can ever be duly administered; not only is it impossible, in time to come, that the trustees can duly administer it, but that a proper scheme should be proposed for the due administration of that fund which is now in Court. And that, my Lords, brings me to this observation, what means have your Lordships, or the Court of Chancery, of ascertaining whether parties do or do not entertain particular belief? It is difficult enough with regard to preaching. A right reverend Prelate put this question to me early in the course of my argument, "Who is to decide whether what is preached is or is not the Gospel?" But if that be difficult, is it not increased in a tenfold degree, when you are not merely to ascertain whether what a party is preaching is the Gospel of *Christ*, but whether certain old women, objects of the charity, do or do not entertain opinions in conformity to the opinions that were entertained by *Lady Hewley* in the year 1704? No

Court has the machinery for carrying that inquiry into effect. How are you to ascertain what a person's religious belief is? What is the machinery to be set in motion? Who is to inquire? Is it to be an inquiry made *toties quoties*? We do not see half the difficulties. The question at present is only as to the doctrine of original sin and the doctrine of the Trinity. Suppose, after the decree is carried into effect and trustees appointed, they should have a new information filed against them, stating that the fund is distributed to persons who do not believe in election and predestination, in the sense understood by Lady *Hewley*: if this decree is to stand, you cannot refuse an inquiry upon that point; and if you say that no parties shall be the recipients of the charity who do not entertain the particular doctrines which Lady *Hewley* entertained, there is no end till you have exhausted every subject of belief upon those abstruse questions. Lady *Hewley* has said nothing of the sort; she left her bounty to "godly preachers of *Christ's* holy Gospel;" and if you allow her opinions to be entered into, you will be creating difficulties, the end of which you will be quite unable to fathom.

On the subject of the removal of the trustees; why are they to be removed? Because they do not entertain opinions in conformity to those of Lady *Hewley*. That is a novel doctrine; it has been in some degree considered of late in the Court of Chancery. By the Municipal Corporations Reform Act, there was cast upon the Lord Chancellor the duty of appointing trustees in the place of the trustees of all the charity trusts that had been held by old corporations; and though the Lord Chancellor had an unlimited field to choose out of, he laid down this very reasonable rule: Having to select trustees *de novo*, there being nothing

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to guide him, and not being, like Lady *Hewley*, a person to select from his own pleasure or feelings, he laid down this rule:—"In ordinary charities which have nothing connected with religion in them, I will leave it to the parties to select whom they please, and they shall be adopted: but if it be a charity relating to the Church of *England*, I will take care that for this charity Church-of-*England* trustees only shall be selected;" *In the matter of the Norwich Charities* (c). It may be very right, where a public functionary, like the Lord Chancellor, is selecting trustees *de novo*, that he should have regard to that circumstance; but it does not follow, because there may be some difference of opinion between the trustees and founder of a charity, that therefore they are to be removed, or are not fit persons to be continued. No one ever heard of a bill or information to remove a trustee because he was a Dissenter. It might perhaps have been open to argument, that if these Appellants had been great controversialists, arguing publicly against the *known* opinions of Lady *Hewley*, they might not be proper parties to administer her charity. But that is not the case here. Is no one to be a trustee who does not hold opinions conforming in all respects to hers? That opens a source of inquiry as to the fitness of trustees for the due execution of trusts, and appointing new trustees, that may give rise to most fruitful litigation. The doctrine was never before propounded, that a conformity of belief with the founder of the trust is an essential ingredient to the due appointment of a trustee: it is for your Lordships to say whether you will sanction that doctrine.

It is proper to remind your Lordships again that these trustees say in their answer that they are will-

ing and desire to administer these charities under the directions of the Court of Chancery. If they have erred in the discharge of their duties, their error arose from a misunderstanding. Lord *Eldon* says, in the case of *The Attorney-general v. The Coopers' Company*, with respect to the removal of the master of a charity school, "It is not the habit of this Court to remove, where there has been a misunderstanding as to the duty; but when that duty is prescribed, the master must determine either to hold the situation, doing the duty, or to discharge himself (*d*)."

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The only remaining point to which it is necessary to call your Lordships' attention is the subject of costs. When the matter was before the Vice-Chancellor, his Honor not only gave the trustees their costs, but all charges and expenses which they in any way had incurred incidental to their defence to this suit; which clearly intimated that, although he removed them, he thought no blame was to be imputed to them. If he thought that they had wilfully misconducted themselves, it would have been his duty, either to make them pay the costs of the information, or not give them their costs, or, at all events, not those comprehensive costs which he did give. It was then considered by the trustees whether they should acquiesce or appeal. Now, in considering whether it was their duty to appeal, whatever may be the event of this suit, whether the judgment is affirmed *in toto*, or modified, or the information dismissed, I ask is there one individual in your Lordships' House, or out of it, who will say that he goes along with the Vice-Chancellor on the grounds upon which he decided? The Vice-Chancellor gave his judgment almost exclusively upon the notion that the "Improved Version" of the

(*d*) 19 Ves. 192.

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New Testament was palmed by Unitarians as a disguised creed upon their followers. His Honor proceeded, in the first place, to show what were the opinions of Lady *Hewley*; quoting her will, and other wills, to show she believed in the Trinity and *Bowles's* Catechism; and then he proceeds thus: "Now, the book mentioned in the catalogue of books at the end of the sixth report of the Unitarian Society, which was called an Improved Version of the New Testament, affords a strong inference that the persons who would assist in the publication of it, cannot come under the description of poor and godly preachers of *Christ's* holy Gospel." And then he goes on to show—with not, I think, the same critical acumen that his Honor ordinarily exhibits in matters of this sort—the extreme errors of some of the translations; and on those grounds only, his Honor determined that parties were not fit objects of Lady *Hewley's* charity, who entertained what is commonly called Unitarian belief and doctrine. The trustees did not feel that they would have done their duty to the numerous persons who looked up to them for protection, if they had not brought the case before the Lord Chancellor. After the appeal was heard for four days by Lord *Brougham* (all heard except the reply), with the assistance of two of the Judges, Lord *Brougham* quitting office, the relators refused to let the matter be adjudicated by Lord *Brougham*; and it then came to be heard before Lord *Lyndhurst*, and there remained to be heard before him the last counsel for the defendants, and the reply. The trustees, feeling that they would not be justified in taking any course which would lead to further expense, were willing to leave it to Lord *Lyndhurst*. His Lordship affirmed the Vice-Chancellor's decree, and made the trustees pay their own

costs of hearing before him, which of course included the costs before Lord *Brougham*. Now, I do trust that your Lordships will see that it was a hard infliction upon the trustees, to be made to pay the costs of these proceedings.

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Mr. *Knight Bruce* and Mr. *Kindersley*, for the Respondents (e):—We appear for the Attorney-general in his official capacity, who is the sole Respondent in this appeal. We are instructed by those gentlemen who, under the name of relators, are the Attorney-general's instruments for prosecuting the suit, and for answering the Defendants in costs, in the event of the suit being declared improperly instituted. The Appellants have the benefit of having the Crown lawyers in their private capacity of eminent counsel.—

[The *Attorney-general*:—I beg to say that my learned friends do not represent the Attorney-general; they represent the relators; and I believe in all such proceedings in Courts of Equity, there are three parties recognised; the Attorney-general, the relators, and the defendants.—

Lord *Brougham*:—We distinguish the persons; you need not trouble yourself.

The *Attorney-general*:—The Attorney-general may, and frequently does, appear by distinct counsel from those who are counsel for the relators.

The *Lord Chancellor*:—I think we understand the character in which the learned counsel appear. The Attorney-general sometimes appears separately from the relators, when there is a contest between the plaintiffs and the defendants.]

Reserving to the latter part of the argument the

(e) Mr. *Romilly* also appeared for the Respondents: Mr. *Booth* was with the counsel for the Appellants.

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consideration of the manner in which this magnificent charity ought to be applied, which is the main question in the cause, and assuming for the present that the benefits of it were intended to be confined to those only who believe in the Godhead of our Saviour, and that therefore the decree is correct in principle, we first consider the objections that have been made to the decree, consistently with the theory of the judgment being right on the main question. The declaration complained of is, "that ministers or preachers of what is commonly called Unitarian belief and doctrine and their widows," &c. are not entitled to partake of the charity. It is said that these terms are vague and uncertain; that the decree is confined to one declaration only; that it is a negative declaration, and does not go on to declare in whose favour the charity was intended. It is true that there are, upon some minor points, shades of difference among Unitarians; there may be some who believe in the doctrine of original sin and the atonement, and some who do not. There may be various shades of doctrinal difference between classes of Unitarians, but there is one cardinal point upon which all agree, and without which Unitarianism cannot subsist;—the denial of the Godhead of our Saviour. A man who does not deny the Godhead of our Saviour is not a Unitarian; a man who does is a Unitarian, whatever difference of opinion between him and others there may be on original sin, the atonement, and minor points. Protestants hold different opinions upon different points, and some of great moment, but they are nevertheless Protestants. The Calvinist is a Protestant, so is the Lutheran and the Anabaptist; because they all agree in some great leading points which are involved in the description. So the term "Unitarians" is not an

expression in which there can be any ambiguity, but one which, in common parlance and by universal consent, has received a fixed popular application. But as that term, by itself, may be open to an imputation of incorrectness,—not only on account of the differences that exist between Unitarians on minor points, but also as it may signify, in strictness, believers in the Unity of the Godhead, in which others also believe, consistently with their belief in the Godhead of *Jesus Christ*,—the decree, adopting language which has received a conventional meaning, uses the expressions “what is commonly called Unitarian belief and doctrine.” One can hardly conceive any expressions better adapted to convey the idea of the Judges whose decree this is; expressions affording a plain, intelligible, and sufficient description of the persons who were intended by that decree to be excluded from the charity.

It has been also said that the decree ought to have gone further, that it ought not only to have contained negative but affirmative declarations; that upon an information a Court of Equity is not bound by the strict rules of pleading which exist between adverse parties in the case of a bill, but will exercise a greater latitude in giving relief upon an information. That is so, when the Court is asked to do it and the case requires it; but why should the Court go further than it has gone, when neither of the parties to the record desired it? Is a Court of Justice to decide or to raise points which the parties litigant before it do not raise and do not wish decided? By this information the Attorney-general thought fit to ask only for common relief; it was competent to the relators to ask relief, if they thought fit, different, more extended, less extended; but that was done by neither party. Was

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the Court to go out of its way to decide a point not raised, not upon the record, not in issue, and on which its opinion was not wished? The cases to which the Attorney-general, in his argument, alluded, are those in which one of the parties to the suit asks relief not prayed on the record. In such cases the Court says, "This is a charity case, and I will give you such relief as is proper upon the facts stated before me, although not prayed for, or asked at the bar." To that length only do the authorities go.

There was but one question for decision in this cause. The information complained of a misapplication of the charity funds to Unitarian purposes: That was the origin of the suit; the only complaint on which the information was grounded; the only contention between the parties, who did not think fit on one side or the other to ask the opinion of the Court on any other question. Both parties agreed that Protestant Dissenters from the Church of *England* were alone intended to be objects of the charity, and the question was whether Unitarians came within that description. There was no third party representing any third interest. The Attorney-general might, if he thought proper, have directed any other parties to be represented by counsel, but he did not do so. If the Court therefore had decided any question as between the different classes of Trinitarians, it would have decided it without a record, without argument, and without parties. The decree is a perfect model of precision and accuracy; it does not decide that Trinitarian Dissenters were alone intended, but declares that Unitarians were not intended; it is the decree of a careful Judge, applying his mind to the question before him, deciding that on which alone he had the means of arriving at a safe conclusion; avoiding the

decision of unnecessary points; above all, not prejudging the absent, nor going into matter in which their interests might be involved. If members of the Church of *England* should ever claim to be entitled to the benefits of this charity, it will be competent for them, by filing an information at any time, to obtain the opinion of the Court on their title: this decree, with exemplary caution, leaves that question, and also all questions between different classes of Unitarians, entirely open.

If the trustees are properly removed, what right have they to bring under discussion those questions, or any question regarding the future administration of the charity, which they have ceased to administer, and in which they cannot allege that they have any interest? If they were continued as trustees, they would then have a right to further directions for the conduct of the cause and of the charity; but if they are properly removed, they cannot be heard to make even a suggestion on the subject. Now let us consider whether those trustees were properly removed; still assuming that the principle of the decree, on the main question of the application of the charity, is right. All the trustees, except the Messrs. *Heywood*, Mr. *John Wood*, and Mr. *Palmes*, are admitted to be Unitarians; Mr. *John P. Heywood* is dead, and therefore it is useless to discuss whether he ought to be continued a trustee; the offer was made to him, and was declined. Mr. *Palmes* being a member of the Church of *England*, that alone would be sufficient ground—but it is not the only ground—of removing him from the trusts of a Dissenting charity. It is impossible to say, from the answers of Mr. *Peter Heywood* and Mr. *Wood*, whether they are Unitarians or not; the information did not charge that they were, but

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it may be well assumed that neither would desire to be continued in this trust on the ground of not being Unitarians. The principal ground on which the removal of all the trustees rests is, the misapplication by them all of the funds of the charity. It is upon that ground chiefly that Lord *Lyndhurst* puts their removal (*f*). But we submit that Unitarians ought never to have been appointed trustees of this charity, and if there was ever any case which would support that view more strongly than another, it is that case of the *Norwich* Charities referred to by the Solicitor-general, which is a recognition 'by the highest authority of every principle that we can desire to support our present argument. "The Master," says the Lord Chancellor (*g*), "in selecting the new trustees, has, with my entire concurrence, whenever the charity was for Church purposes, selected as trustees persons who were members of the Church of *England*. It has been thought proper that when the object of the trust has been exclusively connected with one particular religious party, the trustees who were to have the control over it should be of the same religious party." Every man of common sense, to whatever creed he may belong, must agree in the accuracy of these principles, whether they be applied for one church or another; and on these principles we ask that this question may be decided; that the persons to administer this religious charity should belong to that class of religionists to which the charity was appropriated; and that therefore every Unitarian appointed a trustee, was improperly so appointed.

Great and grievous complaints have been made by the counsel for the Appellants of the reception of

(*f*) Vide *supra*, p. 401.

(*g*) 2 Myl. & C. 305.

inadmissible evidence in this cause, but they have not put the House in a condition to determine whether evidence has or not been improperly received in the Court below; for their petition of appeal raises no question as to evidence, but alleges, in the ordinary terms, error in the decree, of course upon the materials on which the decree is founded. If parties appealing mean to object to the reception of evidence, they ought to state that objection in their petition of appeal; at least the petition should suggest that ground of objection to the decree. Lord *Eldon*, on objections being made at this bar to the reception of improper evidence in the Courts below, used always to call for the petition of appeal, to see if it raised the question. A great part of the evidence alleged to have been improperly received in this cause, went to show that the religious principles of Unitarians were opposed to or at variance with the principles of Presbyterian and Trinitarian Christians. We admit that this evidence is to be taken only as the opinions of learned men, conversant with the subject, and as deductions from their historical and controversial reading. It was proved that a great majority of these trustees were Unitarians: that four of them were members of the British and Foreign Unitarian Association, the principal object of which is the promotion of Unitarian worship in *Great Britain* and abroad, by assisting poor congregations; by sending out missionary preachers; by the publication and distribution of tracts, controversial and practical, in a cheap form, setting forth the belief and doctrine of Unitarians: that more than a due proportion of the funds of the charity was applied to Unitarian purposes: that all the five exhibitions limited by the foundation deed, and one more, were given to students in

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Manchester College, a Unitarian seminary; and that though Mr. *Wellbeloved*, the Unitarian principal and professor of theology in that college, had therefrom an income of 263 *l.*, and could not therefore come under the description of a *poor* and godly preacher, yet he received 80 *l.* annually from this charity. The greatest struggle between the counsel in the Courts below was on the admissibility of the memorial to the trustees from the minister and congregation of the Unitarian church at *Rossendale* in *Lancashire*; yet the petition of appeal does not complain of its reception in evidence. That memorial stated the separation of the memorialists from the Methodist connexion, and that they examined the doctrines of original sin and the atonement, and discarded them as unscriptural and irrational; and lastly, that they relinquished the doctrine of the divinity of *Christ*: yet upon that memorial, which no one can read without shuddering at the language contained in it, the trustees granted the assistance that was asked. How can it be contended that it was not the duty of the Court to remove trustees who so misapplied the charity funds? After being guilty of such plain breaches of trusts, they were treated most leniently in not being charged with costs.

But kindness does not always beget gratitude. It was in hopes of having an end put to this expensive suit, that, at the pronouncing of the decree, the then leading counsel for the Respondents consented that not only the defendants' costs in the cause, but all their expenses incurred about it, should be paid out of the charity funds. The result expected did not follow; the defendants appealed to the Lord Chancellor, and they now complain that when that appeal was dismissed, their costs were not allowed them.

There may be cases in which it would be competent to the Court, where there is a fund, not merely to exempt an unsuccessful Appellant from payment of costs, but even to allow his costs out of the fund ; but those cases are exceptions to the general rule, and depend upon the nature of the questions in the appeal and on the situation of the parties appellant. What difficulty was there in the question in this case to justify an appeal ? Why should the removed trustees think it their duty to appeal ? Might not they leave the public interests to the protection of those to whom the law entrusted them—the law officers of the Crown ? If they meant to be patriotic and take on themselves to represent the public interest, why should they grudge a little expense ? They put themselves in a position for which the whole body of Unitarians feel obliged to them, and that ought to be their sufficient reward. But it has been said that the Vice-Chancellor recommended an appeal. That must be a mistake ; any such recommendation would be inconsistent with the course of his Honor's judgment, which imports a clear and strong conviction on the subject. His Honor might indeed have considered an appeal very probable ; for there was not only involved in the cause the *odium Theologicum*, but there was also a fund *in medio* ; and all who have experience in Courts of Justice, know that there is no more fertile source of litigation than those two. Under the circumstances, there was no hardship at all in that part of the Lord Chancellor's order refusing the Appellants their costs, particularly when it is known that the Respondents, with the Attorney-general's consent, paid them the costs of the abortive hearing of the appeal before Lord *Brougham*.

With regard to the objection raised at the bar to the

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reception of evidence, although the Appellants do not complain of it in their petition, still the Respondents are prepared to answer it. No lawyer can deny that it is the duty of a Court of Justice, in expounding written instruments, to put itself in the situation of the maker of the instruments, to try to have the same knowledge he had, and to be surrounded with the same circumstances. A familiar illustration of this necessity occurs in determining questions arising on devises or bequests to "children." Who can determine the application of that word, without first knowing the state of the testator's family, and the circumstances surrounding him? The word "children" includes natural children, if the testator has any, and has not legitimate children; if he has both, then the legitimate children only take. So if one uses the terms, "divine worship," "religious worship," "the propagation of religion," these being terms technically relative to the person using them, their interpretation is so inevitably connected with his opinions and habits, that until these are known the meaning of the terms used cannot be known. If a person of the Jewish persuasion bequeaths a sum of money for the promotion of religious worship, is it to be applied to the Metropolitan Church Building Society? If a Roman Catholic, whose charities are now placed by law on a footing with those of Protestant Dissenters, bequeaths a sum for the purposes of religious worship, would it not be contrary to common honesty to contend that it should be applied to Protestant purposes? The words of gift in all these cases must be construed with reference to the habits and opinions of the individual who uses them; and without first knowing these opinions and habits, no Judge can arrive at the true construction of them.

The cases upon the admission of extrinsic evidence in aid of the interpretation of written instruments, are collected and analyzed in Mr. *Wigram's* excellent treatise, which contains everything that is required to be known on the subject. He states in the fifth proposition, that, "for the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every material fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will." Every part of that proposition is supported by a great number of cases of the highest authority (*h*). In *Doe d. Gore v. Langton* (*i*), Lord *Tenterden*, in delivering the judgment of the Court, said, "Our opinion in this case is founded upon the will of the testator, together with such only of the extrinsic facts as furnish the date of the purchase and the situation of the lands in question, and show that *William Gore Langton*, the defendant, was the eldest son of the testator, and had married a lady of fortune and taken her surname of *Langton* in addition to his own, and that the ancient seat of the *Gore* family was at *Barrow*, the eldest son residing at *Newton Park*; and all these facts were undoubtedly admissible in evidence." In *Doe d. Jersey v. Smith* (*k*), Mr. Justice *Bayley* said, "The evidence here is not to produce a construction against the direct and natural meaning

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(*h*) See Treat. from 53 to
p.82 (3d ed.)

(*i*) 2 Barn. & Ad. 680.
k) 2 Brod. & B. 553.

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of the words, not to control a provision which was distinct and accurately described, but because there is an ambiguity upon the face of the instrument, because an indefinite expression is used, capable of being satisfied in more ways than one; and I look to the state of the property at the time, to the estate and interest the settler had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest, or situation, would assist us in judging what was her meaning by that indefinite expression." And the same learned Judge repeated these observations, and took a more extensive view of the subject, in giving his opinion to this House on the same case, when it was brought here by writ of error (*l*). In *Doe d. Templeman v. Martin (m)*, Mr. Baron (then Justice) *Parke* said, "I think facts and circumstances relating to the subject of the devise are admissible; such as possession by the testator, the mode of acquiring, local situation, and the general state of the testator's property. The Court may take such things into consideration, so as to put themselves in the place of the testator, and then see how the terms of the will affect the property." And Lord *Brougham*, in *Guy v. Sharpe (n)*, observed, "On the reception of extrinsic evidence, with a view to aid the construction and give explanation, not to alter or control the sense—a purpose for which it can never be received—there is a manifest difference between the declarations, whether verbal or written, of a testator, and the proof of facts and circumstances, by the knowledge of which the Court, when called upon to construe, may be placed in the same situation

(*l*) See *Smith v. Earl Jersey*,
 3 Bli. pp. 389 to 394.
 (*n*) 1 Myl. & K. 602.

(*m*) 1 Nev. & M. 524; S.C.
 4 B. & Ad. 77.

with the party who made the instrument, and may thereby be the better able to understand his meaning." Though most of the reported cases turn upon the construction of wills, the same principle of construction applies to deeds; there cannot be any difference in this respect between deeds or other writings and wills.

No Judge can interpret the word "godly," used in those deeds by Lady *Hewley*, until he knows who and what she was. It is a relative term; that which is godly in one sense, is ungodly in another; that which is godly to Unitarians may be ungodly to Trinitarians: it is a term that includes an unavoidable reference to the person who uses it; to his opinions and modes of thinking, as testified by his habits of acting; and it is, therefore, a term the construction of which is impossible without knowledge of those habits. There is the further circumstance to be considered, that the word may have a far different meaning in 1704 from its meaning at the present time. The fashion in words, as in dress and other matters, is subject to frequent change. Words used by the best-educated persons in the reign of Queen *Anne* are now disused altogether, or applied to matters essentially different; and, therefore, in construing an instrument made many years ago, we are not to confine ourselves to the meaning of the terms contained in it as they are now used, but must consider their meaning and ordinary application at the time of the date of the instrument. Upon this subject an eminent divine (Dr. *Waterland*), in the collection of his works by *Van Mildert* (vol. 3, p. 258), expresses himself thus, with the precision of a lawyer:—"It is to be considered that Scripture consists of words, and that words are but signs, and that common usage and acceptation are what must

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settle their meaning. And when anything comes down to us in a dead language, as Scripture now does, the customary use of words in that language at the time when they were spoken or written, must be the rule and measure of interpretation; only taking in with it the drift and intention of the speaker or writer, so far as it may be certainly known or probably presumed from evidences or circumstances."

It is worthy of observation, in closing this answer to the Appellants' objection to the decree as founded on improperly admitted evidence, that while they have insisted that no evidence was receivable of Lady *Hewley's* religious habits, they have described her throughout their printed case as a Nonconformist, who intended the benefit of her charities for those Nonconformists who are called Presbyterians. How could they have so described her and her charities without having recourse to extrinsic evidence? She does not so describe herself in the deeds. Never have arguments been urged more pointedly *allegantes contraria* than those which have been addressed to the House by those Appellants.

We now come to the main and really important part of the case; the establishment of the position which we have hitherto assumed to be true, namely, that persons who deny the Godhead of our Saviour *Jesus Christ* are not fit objects of Lady *Hewley's* charities. It has been a great struggle of the Appellants, as well in the Courts below as at this bar, to show that Lady *Hewley* was not only a Nonconformist, but that she was adverse to all creeds and forms, and substantially of latitudinarian principles, indifferent to any particular tenets of religion, holding only that a believer in the Bible might deduce from it what doctrines he pleased, so that he did so

conscientiously and to the best of his judgment. To the numerous quotations from learned writers, lay and divine, and to all the laboured arguments for the Appellants on that point, a sufficient and a conclusive answer is given in the opinion delivered by Mr. Baron *Alderson* to Lord *Lyndhurst*:—"We," says that learned Judge, "were much pressed with quotations from various authors on this point by the learned gentlemen who argued for the defendants; but they have failed to satisfy us even as to the probability of any such catholic intention having been entertained by Lady *Hewley*." "The greater part, if not the whole of those quotations, seem to us applicable rather to the terms of Church communion than to the present subject; for the question now is upon a charity to be devoted to the active propagation of doctrines by pecuniary encouragement given to their professors; and is not whether, without any particular test, it may not be allowed to persons differing on material points to waive them, and notwithstanding to associate in one religious community together." "This argument as to a supposed catholic intention, seems inconsistent also with the probabilities of this case. Lady *Hewley* must have had fixed religious opinions, conscientiously and strongly felt by her, or else it is not likely that she would have made this foundation." "Those who entertain what are called latitudinarian notions on such subjects, are not commonly those who leave their property in this way. But waiving this, it seems to us clear that Lady *Hewley*, by requiring the Apostles' Creed, or any definite creed at all, as a necessary qualification in this case, has herself given a decisive answer to this argument, and has negatived the probability of her having ever entertained this supposed catholic intention (o)."

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(o) Vide *ante*, pp. 387 and 388.

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It is abundantly proved by the documentary evidence in this cause, that Lady *Hewley* was a firm believer in the Godhead of our Saviour, in the doctrines of the Trinity, original sin, and the atonement. It is proved by her will, and the wills of her husband and of her friend, trustee, and spiritual adviser, Dr. *Colton*, and by the funeral sermon preached by him upon her death. And if further proof were required, it is supplied by her directions that the poor almspeople should repeat the Creed and *Bowles's* Catechism. No doubt she meant the Apostles' Creed, as it is the only creed ever mentioned without a prefix; and her using the word "creed" simply, evinces her familiarity with it as a matter of which she was constantly hearing. No one denies that the Creed enunciates the doctrine of the Trinity. The witnesses say that the Catechism also, which must be taken to include the texts of Scripture referred to in the margin, is Trinitarian. The question is matter of science; and we are bound to listen to those scientific witnesses, on this as on other questions of science. It is admitted that the Catechism inculcates the doctrines of original sin and the atonement, which are rejected by Unitarians; so that neither the Creed nor *Bowles's* Catechism could be used by Unitarians; and accordingly, since they got into the management of the charities, both have been disused in the almshouse.

The next question is, whom did Lady *Hewley*, herself being a Trinitarian, point out as objects of her bounty, by the description of "godly preachers," "godly persons," &c.? The reverend and learned witnesses, Dr. *Pye Smith*, Dr. *Bennett*, and Mr. *Manning Walker*, who were examined in this cause, all agreed that, from their acquaintance with the publications of the time of Lady *Hewley*, they were able to say that the words "godly preachers" and

“godly ministers” were then employed, in conversations and writings by Nonconformists, to designate Dissenting preachers and ministers generally; that in their ordinary application they became terms of distinction between those and the ministers of the Established Church; that the term “Presbyterian” was commonly used as the description of a class or denomination of *English* Protestant Dissenters, whose religious belief was not Unitarian but Trinitarian, differing from the class of *English* Protestant Dissenters called Congregationalists in the mode of admission to or exclusion from the holy communion, and, so far as Baptists were concerned, in the matter of infant baptism; that all these Dissenters believed in the doctrine of the Trinity, there being then no party called Unitarian Dissenters in existence; that it would have been considered by the Presbyterians a calumny injurious to their body to have it imputed to them that they denied the doctrine of the Trinity; that, in point of doctrinal sentiments and religious faith, there was no difference between Presbyterians, Independents, and Congregationalists, at the time of the foundation of those charities; and the Presbyterians being by far the most numerous body, the three classes were called by that name.

There is no question that all these three classes of Protestant Christian Dissenters were within the scope of Lady *Hewley*’s charities; all of them, like herself, believing in the Trinity, and in the other essential doctrines of Christianity. It now becomes necessary to decide whether Unitarians, who by their own admission reject these doctrines as unscriptural and irrational, can be brought within the description of “godly preachers and persons,” in the sense in which these words were used by Lady *Hewley*. Let us see

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what Unitarians are, and were at the time of the foundation of these charities. We cannot clearly collect their religious doctrines from the answers of Mr. *Wellbeloved* or the other Appellants. We find some knowledge of their principles in the sixth report of "the British and Foreign Unitarian Association," to which some of the Appellants belong; but they are declared most unreservedly in the sermons of the reverend Appellants Mr. *Wellbeloved* and Mr. *Kenrick*, both trustees of these charities. All these documents are contained in the printed papers laid before the House, and they show that the sect of Unitarians take credit to themselves for rejecting as irrational and contrary to the Scriptures several doctrines which all other sects consider to be essential doctrines of Christianity. Dr. *Bennett*, whose evidence has been before referred to, says of them, "There is a sect usually calling themselves Unitarians, but who used to be called *Socinians*, and who are often by the ignorant vulgar called Presbyterians. The term Unitarians has been chosen by themselves, and is now generally conceded to them by courtesy, to the sacrifice of theological accuracy; for it assumes that they alone believe the unity of the Deity, though Trinitarians declare their belief in the Divine unity; but as the term *Socinian* is now generally offensive to those who used to be called by the name, and as they declare that they do not agree with *Socinians* in everything, the term Unitarian has been suffered to pass current; but as those who are called Unitarians generally occupy meeting-houses that were built for Presbyterians, and as the present occupants can legally hold them only under the profession of being Presbyterians, they for a long while called themselves by that name; and thus among the ignorant the term Presbyterian has

been supposed to be synonymous with Unitarian, greatly to the discredit of the real Presbyterians, and to the confounding of all theological distinctions." A reference to the publications of eminent theological writers will show that what is called Unitarianism was considered by the Nonconformists of Lady *Hewley's* time as a thing abhorred, the very imputation of which was a stigma in society as well as by law; and that the words "Christians," and "Dissenters," and "Protestants," did not include persons who denied the Trinity. Mr. *Howe*, an eminent Nonconformist of that time, in his "Calm Discourse on the Doctrine of the Trinity," thus expresses himself: "That there is a Trinity in the Godhead, of Father, Son, and Holy Ghost, is the plain obvious sense of so many Scriptures, that it apparently tends to frustrate the design of the whole Scriptural revelation, and to make it useless, not to admit this Trinity." Mr. *Benjamin Bennett*, another eminent Nonconformist, in his "*Irenicum*, or Review of some late Controversies," published in 1722, says, "Christians are agreed in such articles as those which may be reckoned among the fundamentals; that there is but one God, and yet there are three Persons, Father, Son, and Holy Ghost, to whom the Scripture ascribes divinity."

[Long quotations were then made from the published works of Drs. *Calamy*, *Waterland*, *Pearson*, *Manton*, *Williams*, *Bates*, *Owen*, and *Sherlock*; of *Baxter*, *Corbett*, *Lobb*, *Matthew Henry*, *Watson*, *James Owen*, and *Nathaniel Taylor*, marking their opinions that a belief in the Trinity is a fundamental doctrine of the Christian religion, and that disbelievers in it are not Christians. The preamble and general language of several Acts of Parliament, particularly the Blasphemy Act (9 & 10 W. 3, c. 32), were also referred to, as

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proving the sense of the Legislature that a denial of the Trinity was contrary to Christianity; and passages were read from the works of the before-named and other theological writers, to show that deniers of it were not formerly included among Dissenters or Protestants.]

That being the position in which persons who denied the Trinity, and who are now called Unitarians, were held in society and by law in the time of Lady *Hewley*, can it be supposed that they are within the meaning of the terms “godly preachers of *Christ's* holy Gospel,” and “godly persons,” by which she designated the objects of her bounty? That pious lady would, as the Vice-Chancellor observed, have considered it the worst calamity that could befall her charity, if such persons were to partake of it. In construing her intentions in founding this charity, it should not be forgotten that Unitarianism, or the denial of the Godhead of our Saviour, was proscribed by the Legislature under the severest penalties. That consideration should form an index of her intentions. A charitable trust for the benefit of a sect so proscribed would have failed *pro tanto*. The Appellants admit that, but contend that as all penal laws against the denial of the Trinity are repealed by the Act of the 53d *Geo.* 3, Unitarians being thereby put on a level with other Protestant Dissenters, are entitled to the benefits of these charities, as being “godly preachers” and “godly persons,” &c. *for the time being*; as if the foundress was looking forward into futurity, and contemplating a change in the law. It is impossible to suppose that the foundress of the charities had any such intention; nor can the words “for the time being,” coupled as they are with the different portions of the deed, bear any such inter-

pretation. It being illegal in 1704 to found a charity for the propagation of Unitarian doctrines, if, after 10 or 20, or any number of years before the 53d *Geo.* 3, an information had been filed for administering the trusts of this charity, and a scheme directed for the management of it according to the intentions of the foundress, all persons professing Unitarian doctrines would be excluded. There could be no exhibition to an Unitarian college. Then, if this charity was, for more than a century after its foundation, applicable by law only in one way, can it be said that, because an Act passed in 1813, making it lawful, as far as statute law is concerned, to apply the charity from that time to Unitarian purposes, that Act operated so retrospectively upon pre-existing charities, which had their definite objects according to the existing law at the time of their foundation, that they may be applied in a way which for a century after their foundation was not legal? The difficulty of their position was seen by the Appellants' counsel, and to try to obviate it, they referred to the case of *Bradshaw v. Tasker* (p). All that was decided in that case was, that the Act of Parliament, passed for putting Roman Catholic churches, schools, and charities on the same footing in point of law as those of Protestant Dissenters, had a retrospective operation on a previous endowment. Whether that case was well or ill decided, it has no application to the present. It might be applicable to the construction of an Act, if such an Act were to be passed, for putting Unitarians on a level with Protestant Dissenters in respect to Dissenting charities. The question here is not whether the Act 53 *Geo.* 3 is or is not retrospective, but whether, being an Act in its terms and intention to

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take effect prospectively from the time of its passing, it can be said, as a proposition of law, that the laws being changed, the old established charities are also changed from their purposes, and are applicable to purposes to which they could not be legally applied at the time of their foundation, or for a century afterwards? It would be contrary to every principle of construction and to all analogy, to hold that an Act passed to-day to make lawful henceforward what was unlawful for above a century, is to operate so as to alter entirely the constitution of an establishment founded under the pre-existing law. But supposing the Act of the 53 *Geo.* 3 was to be held to operate retrospectively to remove all statutory law on the subject of the denial of the Trinity, then comes another question, whether it is lawful at common law, independently of any statute, to found a charity for propagating and preaching doctrines subversive of the religion of the State? It has been ever held, and by the highest authorities, that Christianity is part and parcel of the common law of *England*. There cannot be any legal or scientific definition of Christianity that does not involve, as an essential part of that term, the Godhead of our Saviour. It is impossible to read the observations of Lord *Eldon*, in *The Attorney-general v. Pearson*, without perceiving that he was of opinion that the denial of the Trinity was always unlawful at common law. The Toleration Act did not interfere with the common law; it only relieved Dissenters from certain statutory disabilities, without legalizing the teaching or preaching of any doctrines forbidden by the common law. So also the Blasphemy Act only imposed certain penalties on certain offences, leaving the common law as it was. The 53 *Geo.* 3, c. 160, reciting the 19 *Geo.* 3, c. 44,

simply struck out of the Toleration Act the declaration that its benefits did not extend to persons who by preaching or teaching denied the Trinity; and it also repealed the Blasphemy Act as to such persons, but left the common law on that subject as it was before these statutes. It is not necessary to insist that a man is guilty of a misdemeanor, and may be proceeded against criminally, for denying or preaching against the Trinity. It is a different question whether a man may be indicted for holding or propagating anti-Trinitarian doctrines, and whether a Court of Equity, as this House is in this case, will enforce a trust, or allow property to be applied, for such purposes. That must have been the opinion of Lord *Eldon* in *The Attorney-general v. Pearson*, where he says, "If the common law remains yet unaltered, and if the impugning the doctrine of the Trinity be an offence indictable by the common law, it is quite certain that I ought not to execute a trust the object of which is illegal."

There can be no doubt, upon the evidence which is not objected to in this case, that Lady *Hewley*, and the persons with whom she associated in religious worship, were strict Trinitarians; that she held anti-Trinitarians in abhorrence; and that they could not, according to her intention or by law, be the objects of a charity for the benefit of "godly preachers of *Christ's* holy Gospel."

The *Attorney-general* replied.

The *Lord Chancellor* :—My Lords, it now remains for your Lordships to consider in what form it may be most convenient to submit to the consideration of the learned Judges the questions which arise in this very important case. Your Lordships will be anxious

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to exhaust the subject, so far as it is capable of being exhausted, in the questions which are now to be referred for the opinions of the learned Judges. With that view, I submit to your Lordships several questions which, it appears to me, will go as far as the nature of the case will enable your Lordships to go, in putting those points upon which alone you will require the opinion of the learned Judges; there being some points in the case which are not properly points of law, which therefore must be necessarily reserved for your Lordships to consider; being questions which arise with respect to the administration of the charity, in the event of the questions being answered in a particular way.

The questions I submit for the consideration of the learned Judges, are,—

1st. Whether the extrinsic evidence adduced in this cause, or what part of it, is admissible for the purpose of determining who are entitled, under the terms “godly preachers of *Christ's* holy Gospel,” “godly persons,” and the other descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady *Hewley's* bounty?

2dly. If such evidence be admissible, what description of ministers, congregations, and poor persons, are proper objects of the trusts of those deeds respectively?

3dly. Whether, in putting a construction upon the deed of 1704, any and which of the provisions of the deed of 1707 may be referred to?

4thly. Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and persons of what are commonly called Unitarian belief

and doctrine, are excluded from being objects of the charities of that deed ?

5thly. The same question as to the deed of 1707 ?

And, 6thly. Whether such ministers, preachers, widows, and persons, are, in the present state of the law, incapable of partaking of such charities, or any and which of them ?

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Lord *Brougham* :—I entirely agree with my noble and learned friend, that these questions are proper questions to be submitted to the consideration of the learned Judges, and that they exhaust the subject, without touching upon the matters which are of equitable consideration and ought not to be put to the learned Judges.

Lord *Lyndhurst* :—The learned Judges will take time to consider what answer they shall give to the questions.

The Judges attended this day to deliver their opinions.

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Mr. Justice *Maule*, after reading the first question proposed for the opinion of the learned Judges, said :—The evidence which is the subject of this question may be arranged in two classes ; first, that offered in order to prove the belief of *Lady Hewley* with respect to certain points of theology ; secondly, evidence of the opinions of witnesses as to the meaning of certain words, some being words used in the deeds, and some not. I think that none of this evidence is admissible for the purpose mentioned in the question.

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With respect to the first class ; if the most perfect

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certainly could be obtained with regard to Lady *Hewley's* belief on the points in question, it ought not, as it appears to me, to influence the construction to be put on language in which she makes no reference to her own opinions or belief. It may, perhaps, be reasonably conjectured that a person founding a charity may hope and intend that its benefits may be enjoyed by persons of a like faith with the founder; but if this conjecture be assumed to be well founded, it does not follow that the evidence in question should be admitted. An express reference to her own religious belief was probably avoided on account of the great inconvenience and uncertainty to which it would lead; and the same inconvenience would arise if such a reference should be implied, which it must in effect be if the belief of Lady *Hewley* be considered as material. If her desire were, that persons of like belief with herself should be benefited, the mode which she adopted to secure or promote that object was probably that of naming trustees, whose faith conformed to her own, and providing for a succession of them in a way as little likely as might be to introduce successors of different sentiments; and though this may have failed, I think it was deliberately preferred, by those who prepared the deeds, to the other mode, of leaving it to the Court of Chancery for the time being to determine whose faith approached nearest to that of Lady *Hewley*.

Being of opinion that the belief of the foundress was immaterial to the purpose mentioned in the question, it follows that, by whatever means of proof the nature of her belief were shown, the evidence would, in my opinion, be inadmissible. But even if the belief of this lady were the proper subject of evidence, much, if not all, of the evidence adduced ought not to

be admitted, as not being fit for the purpose of proving it; for example, the extracts from Lady *Hewley's* will, and from Dr. *Colton's* will, and from his funeral sermon, would not, as it appears to me, be legitimate means of proving what was Lady *Hewley's* belief in a cause in which that question was properly raised.

The other class of evidence adduced for the purpose mentioned in the first question, is the evidence of the opinions of persons describing themselves as conversant with the history and language of the time when the deeds were executed. It may be admitted that this description of knowledge is useful to those who have to construe written instruments, whether ancient or modern; a deed, or an Act of Parliament, or any other written instrument, whether a year old or a hundred or more years old, is more likely to be accurately construed by those who are conversant with the history, language, and manners of the time, than by those who are uninformed in this respect. But it does not follow that evidence such as that in question ought to be admitted; on the contrary, the reason of the rule of law that written instruments are to be construed by the Court and not by the jury, probably is, that this kind of knowledge was supposed to be more likely to be found in the Court than in the jury. If the evidence in question were admissible, it would follow that, in a Court of Common Law, the construction of the deeds would be to be left to the jury; for inferences to be drawn from evidence are always for the jury, and not for the Court, except in certain cases, where, of necessity, matters of fact are to be interlocutorily decided by the Court, an exception not applicable in the case supposed.

When the meaning of the words of a written instrument in the *English* language is the subject of

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controversy, historical and other works may with propriety be referred to in the argument addressed by the bar to the Court, as is constantly practised, and as was done largely in the present case. In this way the Court, judging for itself of the weight of the authorities cited, is as likely to arrive at a just conclusion as it would be by the assistance of witnesses, though they should respectively depose, each of them, to his own knowledge of history and theology. The cases in which evidence has been admitted to show the sense in which words are used in a particular trade, or in a particular part of the country, are not inconsistent with this doctrine. It may be reasonable to presume in the Court a general acquaintance with the sense of words, so far as it is to be gathered from the history of the country and its language, and yet to suppose that evidence is necessary to show in what sense a word is used in a particular trade or a limited district; as a general acquaintance with the law of the land is presumed in the Court, while the bye-laws of corporations and local customs are the subject of averment and evidence. If the evidence now under consideration be admissible, it must be on a ground on which we ought to admit witnesses to depose to their opinion as to the meaning of any writing whatever, provided they would introduce their testimony by deposing that they had studied the *English* language, and were conversant with the construction of written instruments.

As to the second question; having, in answer to the first question, stated my opinion that the belief of *Lady Hewley* is not material, it follows that the supposition of its admission will not, in my opinion, affect the answer to this question. The other class of

evidence, the opinion of the witnesses as to the meaning of certain words being to be rejected, as it appears to me, not because it goes to show what is not material, but because it is not a proper mode of proving what is material, might, if its weight and quality were sufficient, have an effect on the construction of the deeds and on the answer to this question; but it wholly fails to lead my mind to any different conclusion from that at which I have arrived, by considering the words of the deeds with the assistance of the arguments and authorities furnished in the discussion at the bar.

If this second question were put on a different occasion, the proper answer to it would be in the words themselves of the deeds creating the charities. It is from those words, and not from any paraphrase of them, that the founder thought fit that her meaning should be collected in any case in which the question might occur, whether a given person were a fit object of her charity. But the question being put by the House of Lords, having the deeds before it, must require an answer of a different [description. To answer it in a perfectly satisfactory manner, and abstracted from any particular purpose for which it may be considered as being asked, would be to find words different from those in the deeds, but which, as applied to every possible case, would have precisely the same sense, which perhaps in strictness is impossible. But though I cannot hope completely to overcome this difficulty, it may be sufficient, with reference to the practical application of the question to the matters in dispute in this case, to say that, in my opinion, the ministers who are proper objects of the trusts of the deed of the year 1704, and of the residuary trusts of the deed of 1707, are those of all sects of Protestant Nonconformists tolerated by law for the

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time being; that the congregations to be benefited under the trust for promoting the preaching of the Gospel in the deed of 1704, and the residuary trusts in that of 1707, are congregations of the same sects; that the poor persons who are proper objects of the residuary trust in the deed of 1704, "for godly persons in distress," are all poor persons whatever belonging to religions of which the worship of the true God is the object; and that the poor women and men who are proper objects of the trusts relating to the almshouse in the deed of 1707, are Protestant poor persons, whether Nonconformists or conforming to the Church of *England*.

With respect to the ministers and congregations intended, who they are depends on the meaning of the words "preachers of the Gospel" and "preaching the Gospel;" and it appears to me that, though these expressions may in a large sense comprehend the ministers and services of the Established Church, they are not, according to their common use both at present and at the date of the deeds in question, to be so understood, but are ordinarily and should on this occasion be taken to mean Protestant Nonconformists. If the Established Church were spoken of or intended to be comprehended, it would have been expressly mentioned, or some words appropriate to the Establishment, such as "clergymen," "priests," "students for holy orders," or the like, which lay in the way of the framers of the deeds, would have been used. It is true clergymen of the Church of *England* may and do preach the Gospel, but that is not their sole or most distinguishing function; and when preachers of the Gospel are spoken of as a class, the clergy conforming to the Established Church are not, according to the ordinary use of language, comprehended. It is not uncommon to use words, which in their utmost

generality would comprehend things of various descriptions, in a limited sense, which excludes the more eminent species. Thus the Parliament consists of the King, the Lords Spiritual and Temporal, and Commons; but the term "Members of Parliament" is commonly used in a sense, in which Members of the Lower House are alone included. A man is an animal, but the word animal is often used without express restriction when man is not comprehended. I do not lay any stress upon the term "godly" in excluding the Church of *England*, being of opinion that the word is used in these deeds in the sense which belongs to it in the translation of the Bible, and in which it is used in common discourse now, and has been for centuries; a sense in which it is pretty nearly equivalent to the word "religious." As to certain classes applying the expressions to themselves, and having it applied as a term of reproach by others, it seems to me not that this word was used in a different sense from what now belongs to it, but that those classes believed or desired it to be thought that they possessed the quality at that time and now signified by this word, and that their enemies used it in derision, by a very common fashion of speech, calling those godly who they meant to say made false pretences to be so.

The trust for godly persons in distress being fit objects of Dame *Sarah Hewley's* and the trustees' and managers' charity, seems to me to be intended to give the trustees, in the administration of so much of her funds as remained after the special objects had been fulfilled, and which probably was expected to be very small, a discretion to apply it to the relief of all such distressed persons as should appear to them deserving, and to be worshippers of the true God, and not living

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in wilful neglect or defiance of his laws. I cannot bring myself to think that the terms "being fit objects of the said Dame *Sarah Hewley's* and the trustees' and managers' charity," were meant as a restriction referring to the sect to which the godly distressed persons were to belong. It seems to me that it is a charitable and a true construction to understand these words as referring to fitness with respect to the nature, cause, and amount of the distress of the parties.

The objects of the trust relating to the almshouses are so defined by the rules and orders referred to in the deed of 1707, as to leave no doubt on my mind that all Protestants, whether conforming or not to the Established Church, are included. The occupiers of the almshouses are to be poor and piously disposed, and of the Protestant religion : these terms appear to me to be unequivocal. There is no usage now, and never was, of these expressions which would exclude the Church of *England*; and the deed is, I think, to be construed according to the sense which general usage gives to its language. I do not think the deed can properly be considered as confining the trusts to objects which were lawful at the time of the deed. There is no such restriction expressed, nor is there any ground, as it seems to me, for implying it; nothing indeed to my mind appears more improbable than an intention that whatever alterations might take place in the law, by increasing or diminishing the amount of toleration, the trusts were to be administered as if the law existing at the time of the deed had remained unvaried. Such alterations had recently happened, and were likely to happen again, and if this had been intended it could easily have been said. It is not said ; on the contrary, the repeated expression "for the time being" seems to point out expressly to

the trustees, that they are to look to what may be lawfully done at the time it is done. If they were not, the trustees must be limited by all the restrictions existing at the time of the deed, and by such further restrictions as the law might afterwards impose; and it would probably be found that few or no dissenting ministers at the present day could be proper recipients of the charity, if the subscription required by the Toleration Act were to be exacted from them as a condition.

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As to the third question, I am of opinion that in putting a construction on the deed of 1704, none of the provisions of the deed of 1707 may be referred to. If the deed of 1707 referred to, or mentioned that of 1704, and contained any declaration of the sense, in which Lady *Hewley* understood the deed of 1704, it would only amount to a declaration of the meaning in which in 1707 she understood the deed of 1704, and would not even then be admissible. But in fact, the deed of 1707 does not refer to or mention that of 1704. The deed of 1707, therefore, could only be admissible as being a transaction by Lady *Hewley* which took place several years after the deed sought to be construed, and could be only admissible on grounds which would admit anything that Lady *Hewley* said or did at any time after the first deed.

On the fourth question, "Whether, upon the true construction of the deed of 1704, ministers or preachers, &c., and of what are commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed?" And on the fifth, which is the same question as to the deed of 1707: I am of opinion that the ministers and preachers,

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widows, members of congregations, and persons mentioned in these questions, are not excluded from being objects of the charities mentioned in the questions. It appears to me that if such exclusion were intended it would have been expressed, as it is in the Toleration Act; and that the reasons which have been suggested for implying it wholly fail. These reasons are, principally, that the terms "godly" and "Gospel" were not applied to persons of the sentiments in question; that at the time of the deeds it was unlawful and liable to penalty to preach such doctrines; and chiefly, that the Unitarian doctrines are repugnant to the essence of Christianity, and consequently that those who hold them could not be comprehended within any charity for Christian purposes. But it seems to me, that, without considering extreme cases, which may be supposed, and speaking with respect to such sects and doctrines as usually occur in practice, all those may be said, and according to the common use of language are said, to preach the Gospel who profess the name of *Christ*, and preach a religion avowedly founded on the Scripture; that "godly" is to be considered as having the sense mentioned in the answer to the second question. The circumstance of the preaching of these doctrines being unlawful at the time of the deeds is, I think, in itself quite immaterial, unless it can be supposed that those who framed the deeds intended that the trustees should be regulated, not by the law for the time being, but by that in force at the time the deeds were executed; a supposition contrary, as it seems to me, to every probability arising from the language of the deeds and the history of the law.

With regard to the amount of error of the Unitarian doctrines excluding those who preach and profess

them, I cannot think that temporal Courts can conveniently entertain the question of more or less of theological error. I think that those who framed the deeds endeavoured, and on a true construction successfully endeavoured, to exclude such an inquiry; my opinion being, first, that according to the use of the words under consideration in the deeds in question, they are not exclusive of any class of Christian Protestant Nonconformists, and that Unitarians are commonly and always have been considered as forming a part of the Christian community.

In answer to the sixth question, I think the ministers and others mentioned in this question, are not incapable, in the present state of the law, of partaking of any such charities. There is no statute now in force prohibiting the profession or preaching of Unitarian doctrines, and I have not found any authority to show that it is prohibited at common law.

Mr. Justice *Erskine*:—My answer to the first question is, that no part of the evidence adduced in this cause is admissible for the purpose of determining who are entitled under the terms “godly preachers of *Christ’s* holy Gospel,” “godly persons,” and the other descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady *Hewley’s* bounty; and in giving my reasons I will first consider the terms of the deed of the 13th of *January* 1704.

From the perusal of this deed your Lordships will have observed that five several objects are pointed out by Lady *Hewley* as the objects of the trust: first, the relief of poor godly preachers, for the time being, of *Christ’s* holy Gospel; second, the relief of poor and godly widows, for the time being, of such godly preachers; third, the encouragement and promotion

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by other means of the preaching of *Christ's* holy Gospel in poor places ; fourth, the education of young men for the ministry of *Christ's* holy Gospel ; and last, the relief of godly persons in distress, being fit objects of her charity. But as it appears to me that the answer to your Lordships' first question, with reference to the four last objects, must depend entirely upon the answer given with reference to the first, it will simplify the view which I have taken of this question if for the present I confine my attention to the first class of persons designated as "poor and godly preachers, for the time being, of *Christ's* holy Gospel ;" and in order to ascertain whether any and what portion of the evidence adduced at the hearing is admissible for the purpose of determining who are entitled to the benefit of Lady *Hewley's* bounty, under this description, it will be right to refer to those general rules of law by which the construction of such instruments is regulated.

It is admitted on all sides that the end of this investigation is, to discover the mind and intention of the foundress in using these terms ; and the question is, by what criterion is such intention to be ascertained ; and although the questions propounded by your Lordships arise in an appeal from a Court of Equity, it will render the inquiry upon the first question more clear and intelligible if it be considered, in this branch of it, with reference to the ordinary procedure in the Courts of Common Law, under which the admissibility of evidence in the construction of a written instrument is subjected to the test, whether in the particular case it be a question of fact, or of mixed law and fact, to be left by the Judge to the jury ; or whether it be entirely a question of law for the Court.

The first general rule is, that all instruments in writing are to be construed by the Court, and the meaning of the terms employed is to be ascertained and fixed by reference to the whole instrument, but to nothing beyond it, unless specially referred to in the instrument itself. But this rule is subject to many exceptions: first, where the instrument is in a foreign language, in which case the jury must ascertain the meaning of the terms upon the evidence of persons skilled in the particular language: second, if the instrument be a mercantile contract, the meaning of the terms must be ascertained by the jury according to their acceptance amongst merchants: third, if the terms are technical terms of art, their meaning must in like manner be ascertained by the evidence of persons skilled in the art to which they refer. In such cases the Court may at once determine, upon the inspection of the instrument, that it belongs to the province of the jury to ascertain the meaning of the words, and therefore that in the inquiry extrinsic evidence to some extent must be admissible; but as neither of these exceptions appears to me to bear upon the question immediately under discussion, it will be unnecessary to dwell further upon them.

But there are other cases, in which the meaning of words employed in a written instrument is also the fit subject of inquiry upon evidence before a jury; but these arise not out of the language of the writing itself, but in consequence of facts that are brought to the knowledge of the Court by evidence *dehors* the instrument, and will therefore more properly follow the consideration of the other general rules, by which Courts are guided in construing writings not falling under the first class of exceptions. In such cases, the first duty of the Court is to ascertain the meaning of

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the words themselves, taken in connexion with the whole context, and next to apply them to their proper object. In ascertaining the meaning of any particular terms, the first rule is, that they are to be taken in their plain and ordinary meaning, unless from the context it should appear that the party had used them in a different sense; the first step in the inquiry therefore would be, whether it appears upon the face of the instrument itself that the writer has used the terms in any particular or extraordinary sense, for if that should be the case then the instrument must be construed according to the particular sense, whether more or less extensive than the primary meaning of the words themselves.

But if no such intention appears upon the face of the writing, it then becomes the duty of the Court to construe the words according to their plain, general, ordinary meaning, subject to certain qualifications. First, if the words used be technical terms of law, the Court must take them according to their strict legal acceptance, although in general and ordinary use they may have acquired a more extensive or a more limited sense: secondly, whether they are technical terms of law or words of ordinary use the Court may give them a more enlarged or more limited construction, whenever it is found that they cannot otherwise be applied at all; and therefore, in all cases, even where the words are in themselves plain and intelligible, and even where they have a strict legal meaning, it is always allowable, in order to enable the Court to apply the instrument to its proper object, to receive evidence of the circumstances by which the testator or founder was surrounded at the date of the execution of the instrument in question, not for the purpose of giving effect to any intention of the writer not expressed in

the deed, but for the purpose of ascertaining what was the intention evidenced by the expressions used; to ascertain what the party has said; not to give effect to any intention which he has failed to express.

Thus, to select an instance of a word bearing a strict technical meaning in law, if a testator leaves his property to be divided amongst his children, the Court would at once construe children as meaning children born in wedlock, and if there were any such children to whom that term could be applied the bequest would be limited to them, although it might also appear that the testator had other children born out of wedlock, and no evidence would be admissible to show that he intended that his property should be equally distributed amongst all his children, whether legitimate or illegitimate. But if upon the evidence it should appear that the testator never was married, so that it was impossible to apply the language of his will in its strict and primary sense, and if it further appeared that he had illegitimate children whom he had always treated as his children, such evidence, and any other that would tend to prove that these were the intended objects of his bounty, might be used for the purpose of construing the bequest according to the less strict and technical meaning of the term "children," so as to give effect to the bequest of the testator, which would otherwise be wholly inoperative. And the same rule would prevail where the terms to be applied are terms of a known definite signification in ordinary use, though not bearing a strict technical meaning. If the evidence should show that they could not be applied in the sense which general usage had attached to them, they may be construed according to any more extensive or contracted sense of which they were susceptible, for the purpose of carrying out the obvious intentions of the testator.

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But, subject to these qualifications, wherever the words employed bear a definite known meaning, and are capable of being applied according to their plain and ordinary meaning, no evidence is, in my opinion, admissible to show that the party intended to use them in a more extended or in a more qualified sense; for, otherwise, every man's will and intention, however expressed, would be liable to be defeated, not, as is now sometimes the case, by his own defective expression of that will, but contrary to his own plainly declared intention; and the cases of *Goodinge v. Goodinge* (q); *Edge v. Salisbury* (r); *Green v. Howard* (s), cited by one (t) of your Lordships, then Attorney-general, at the bar of this House, afford a decisive illustration of this proposition.

To apply these rules to the case before your Lordships, I will first examine whether the words, "godly preachers for the time being of *Christ's* holy Gospel," are in themselves plain and intelligible words; and if they are, whether they are capable of any application in their general and ordinary sense; but as the deed in which these terms occur was executed more than a century ago, it will be necessary to ascertain whether these words were then plain and intelligible, and what was the ordinary sense in which they were then generally understood, because words now known to bear one definite meaning may in former times have been used and understood in a different sense.

I will take, first, the words, "preachers of *Christ's* holy Gospel." The plain and obvious meaning of these words now would be, men who teach and explain the doctrines, facts, and precepts revealed in

(q) 1 Ves. sen. 231.
 (r) Amb. 70.

(s) 1 Bro. C. C. 31.
 (t) Lord Campbell.

the holy Scriptures with reference to man's redemption. This holy Gospel, then, as the revelation of an omniscient and unchangeable God, must always have been the same ; and if the holy Scriptures, like ordinary human writings, were to be subjected to the ordinary rules of construction, it would be for your Lordships judicially to declare what were the facts and doctrines that constituted the substance of the Gospel, and to declare that those who preach such doctrines, and those only, were to be considered as the objects of this part of Lady *Hewley's* trust. But as we are taught by the holy Scriptures themselves that they cannot be properly understood but through the teaching of the same Spirit by whose inspiration they were revealed, and as much difference of opinion on many points, and some conflicting judgment upon all, has always been found to exist in the Church, we are compelled to look for some legal principle upon which Lady *Hewley's* meaning in using the words, "*Christ's* holy Gospel," may be ascertained, without violating, on the one hand, the ordinary rules of construction by the admission of evidence as to her own religious opinions, or assuming, on the other hand, for the Temporal Courts, the power of deciding questions of religious controversy.

The true test of the meaning of these words, "*Christ's* holy Gospel," therefore, appears to me to be that which I have pointed at in my general remarks; the sense in which these words were generally used and understood in *England* at the date of the deed under examination ; and that neither Lady *Hewley's* own opinions, nor the opinions of the sect to which she belonged, can be resorted to, unless it should appear that the words at that time were susceptible of a double construction, either being equally

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applicable, and yet so inconsistent with each other as to render the adoption of them both impossible or irrational.

But then a further question arises : by what means are your Lordships to ascertain what was the sense in which the words, "*Christ's* holy Gospel," were understood in *Lady Hewley's* time? On the part of the relators witnesses have been examined for the purpose of furnishing the Court of Chancery with evidence of the meaning, which they collect from their reading on the subject to have been the sense, in which these words were received at the period in question ; but as this is not a question about any technical term of art, as it is not a question relating to any mercantile contract, nor in reference to the peculiar use of the words in any particular district, it appears to me that it would not be within the province of the jury, but of the Court, to determine the meaning of the terms, and therefore, that the evidence of these witnesses is not admissible for the purpose of this inquiry ; but I humbly submit that it is for your Lordships, by reference to history, to the public writings of known contemporary authors upon the subject, to ascertain and to decide what doctrines were at the period in question generally received and understood as the essential and fundamental doctrines of the Gospel of *Christ*.

If indeed the result of that inquiry should leave your Lordships' minds in doubt whether, in reference to the questions to be decided in this cause, there did exist, at the period in question, any general understanding in the Christian Church as to the essential doctrines of the Gospel, and your Lordships should thus find yourselves at a loss for a clue to the meaning of those words in *Lady Hewley's* deed ; if your

Lordships should further find one class of professing Christians propounding certain doctrines and facts as forming the foundation and essence of the Gospel revealed by the Scriptures, and another class denying that any such doctrines or facts were revealed in the Bible, and that those conflicting opinions were respectively adopted by such equal proportions of the Christian Church as to render it difficult to say that the Gospel of *Christ*, even as to essential points, had any definite meaning generally acknowledged at that time; in such a case, indeed, inasmuch as it would be impossible to suppose that Lady *Hewley* (whose obvious intention it was to promote the spiritual welfare of others by the propagation of that faith by which alone they could be saved) could have been indifferent about the doctrines to be taught, or could have meant that opinions so opposite, upon the essential truths to be believed, should equally form the objects of her trust, it would become necessary, and in that case allowable, to inquire to which of these two classes Lady *Hewley* herself belonged. For as it would then appear that there were two several objects, to either of which the language of the deed might be applied, but that it could not in fair construction be applied to both, evidence would be admissible to show to which of those objects it was the intention of Lady *Hewley* that her bounty should be confined. But as, for the reasons which I shall have to give presently, in my humble judgment no such difficulty arises in this case, I do not qualify the general answer which I have already given. When your Lordships shall have affixed the proper meaning to the term “preachers of *Christ’s* holy Gospel,” it will remain to be decided whether that description will extend to all the preachers of that Gospel, or whether it is to be

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confined to any particular class. And it has been supposed that the word "godly" was intended by Lady *Hewley* to limit the selection of her trustees to preachers dissenting from the Church of *England*, because it is said that in Lady *Hewley's* time the word "godly" had acquired that limited sense.

If it could be shown that the word had been generally so used and understood, I should have acquiesced in the conclusion suggested; but the word is in itself plain and intelligible; and we learn from our translation of the Bible, by the Liturgy of the Church of *England*, by the writings of learned and pious men of every religious persuasion, that it has always borne the same general signification which it now has; and although it may be true that the words "godly preachers" were, about the time in which Lady *Hewley* lived, and with which she was conversant, appropriated by those who dissented from the Church of *England* to their own ministers, yet even in this peculiar appropriation it was employed in its general and ordinary sense, and was intended to mark the contrast alleged to exist in fact, in spiritual life and holy zeal, between those who preached within the Church and those who preached without it. But it would, in my opinion, be contrary to the rules of sound legal interpretation to allow this partial application of a term to a particular class to strip it of the more comprehensive sense in which it was generally employed. As the same answer to the admissibility of evidence will be found equally applicable to the description of the other objects of Lady *Hewley's* bounty, both in the deed of 1704 and of 1707, I shall not fatigue your Lordships by examining them in detail.

As to the second question propounded by your

Lordships; having, in my answer to your Lordships' first question, declared my opinion that no part of the evidence is admissible, I hardly know in what way I ought to answer this second question; whether I should assume that your Lordships require our opinions upon the legal effect of the evidence set out in the proceedings, or only require from each of the Judges his opinion on the legal effect of so much of the evidence as he may consider admissible.

But as in the view which I have taken of the case the result would be the same whether the evidence be admitted or not, I may at once answer this second question by stating, that in my opinion, under the terms "poor and godly preachers for the time being of *Christ's* holy Gospel," all poor and holy men who, at the time of their selection by the trustees, were actually preachers of the Gospel, as it was generally received and understood by *English* Protestants at the date of the deed, were proper objects of the first trust of that deed, whether they were Conformists or Nonconformists, Churchmen or Dissenters. I think the trustees were confined to select such preachers from amongst Protestants, because the language of the deed seems to be generally inapplicable to the clergy of the *Roman* church, because the provision for the widows of such preachers points at a class of married clergy, and because there are tenets of the *Roman* Church incompatible with the doctrines then generally understood and received by Christians in *England* as constituting the Gospel of *Christ*. I think the trusts were not confined to Nonconformists or Dissenters, because the terms employed were not inapplicable to poor and godly curates of the Church of *England*, although the term poor might seem to exclude a beneficed clergyman from all participation

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in the benefit of the trusts, and because I do not find that the word "godly" had then acquired a meaning exclusively applicable to Dissenters or Nonconformists. But I further think, that whether evidence of the fact of Lady *Hewley* being a member of the Presbyterian body, and of the religious opinions of that class of Christians, be admitted or not, the trustees were restrained by the terms of the deed from selecting any preacher who taught as part of the Gospel of *Christ* any doctrines at variance with the doctrines then generally received and understood as fundamental and essential doctrines of the Gospel, or who purposely or systematically suppressed in their preaching any of such fundamental and essential truths.

The other descriptive terms in the deed of 1704 appear to me to be subject to the same rules of construction. The widows are to be actually widows at the time,—widows for the time being; they are to be godly women and widows of poor and godly preachers of *Christ's* holy Gospel. The money to be employed in encouraging preaching is confined to the preaching of *Christ's* holy Gospel. The exhibitions are to be for educating young men designed for the ministry of *Christ's* holy Gospel; and although there is not the same express reference to the Gospel in the last object of the trusts of this deed as in the others, and the objects are in no way connected with the office of preaching, yet as they are to be godly persons, and fit objects of Lady *Hewley's* and the trustees' charity, the trust appears to be so connected with the former descriptions as to require that the objects should belong to the same class of Christians as those already designated; and although the language of the deed of 1707 varies in many respects from the terms

employed in the deed of 1704, yet as the later deed is obviously in furtherance of the same general purpose, the construction of the later deed should be as nearly as possible in conformity with the provisions of the former instrument, unless in the later deed there should be found expressions pointing to a more extended or more limited object.

But it appears to me the expressions in the deed of 1707 require the same construction as that which I have already submitted to be the proper construction of the deed of 1704. First, the objects of this deed are in terms required to be Protestants; secondly, all the provisions are consistent with their being either Churchmen or Dissenters; thirdly, it was obviously Lady *Hewley's* design that they should agree in the fundamental and essential truths of the Gospel, for such only could be expected to meet together in social prayer, and such only could conscientiously use Mr. *Bowles'* Catechism, in the sense which the texts referred to seem to require.

With regard to the third question proposed by your Lordships; as in my answer to the first question I have excluded from the case all evidence of Lady *Hewley's* religious opinions, and as the contents of the deed of 1707 could only be used in the interpretation of the deed of 1704 by showing what Lady *Hewley's* religious views were in the later year, I must necessarily hold that the later deed cannot be referred to in aid of the construction of the former.

My answer to the fourth and fifth questions has in effect already been given to your Lordships in my answers to the first and second questions; for, as I collect from the history of the times immediately

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preceeding the execution of the deed of 1704, in *England* the body of professing Christians was divided into six classes, namely, members of the Church of *England*, members of the Church of *Rome*, Presbyterians, Independents, Baptists, and Unitarians,—for most of the Nonconformists, if not all, had at that time joined one or other of the latter classes;—and as I find from the articles and creeds of the Church of *England*, from the catechisms of the Presbyterians, from the public writings of the historians and the different controversial authors of that day, including *Barter* and others,—whose works have been cited as manifesting a more tolerant spirit than was unhappily common in those times,—that all these classes of Christians, except the Unitarians, considered the doctrine of the Trinity as one of the great fundamental and essential doctrines of the Gospel; and when I find the same fact admitted by two of the defendants in sermons produced as evidence in the cause; and when I find, on the other hand, that the denial of the doctrine of the Trinity and of the atonement formed the distinguishing feature of the Unitarians' faith, and that those who at that time professed it were but few; that they rejected, as unscriptural, doctrines, which all other Christians then held to be essential articles of the Christian faith; and that the name of "Unitarian" had been assumed to distinguish them from the rest of the Christian world, as paying supreme worship to God the Father only; and when I find that at the date of *Lady Hewley's* deed those who denied the Trinity were by the Legislature denounced as guilty of blasphemy;—I cannot come to any other conclusion than that *Lady Hewley* did not intend to include them under the description of "Godly preachers of *Christ's* holy Gospel," and conse-

quently not under the other descriptions in the deeds either of 1704 or 1707 ; but that the phrase, “ preachers of *Christ’s* holy Gospel,” was selected for the purpose of excluding all who preached such doctrines.

Your Lordships will observe, that, although I have alluded to the statute 9 & 10 *Will.* 3, c. 32, I do not rest my opinion upon any assumption that the views of the Unitarians are actually unscriptural, because so declared in that statute now repealed, neither do I found it upon any incapacity created either by that Act or the earlier statutes against Nonconformists, nor on the fact of the Unitarians being excepted out of the Toleration Act ; but that I have merely used the state of the law at the time, as assisting to show what was the general understanding at that time of the essential doctrines of the Gospel, and in what sense, therefore, Lady *Hewley* used the words in question. But as it was argued on behalf of the defendants, that one phrase used by Lady *Hewley* in the description of the preachers and their widows had reference to those statutes, and their subsequent repeal, I think it right to remind your Lordships of the manner in which those words are introduced ; the words I allude to are, “ for the time being ;” and it was supposed that they had been introduced by Lady *Hewley* for the purpose of enabling her trustees to extend the field of her bounty as the statutory prohibition might be withdrawn, and as if she had said “ all preachers tolerated by law.” If the words had been, “ to all godly preachers of *Christ’s* holy Gospel for the time being,” there would have been more plausibility in the argument ; but the words are, “ preachers for the time being,” “ widows for the time being ;” that is, as I understand them, as I have already said, preachers at the time of their selection as objects of the trust ; not men who have

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been preachers, or who may intend to be preachers; but men at that time preachers, and women still continuing widows of such preachers. As I do not, therefore, consider that the Unitarians were excluded merely by their incapacity at the time to take the benefit of Lady *Hewley's* trust, so I do not consider that the removal of their incapacities will bring them within the purview of the deed. I must therefore, for these, and for the reasons already given in answering your Lordships' earlier questions, reply to the fourth and fifth, that preachers of what is commonly called the Unitarian belief and doctrine, and their widows and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of either of the deeds referred to in those questions.

As to the sixth question : if your Lordships should decide that the language used by Lady *Hewley* is sufficiently extensive to include Unitarians as objects of her bounty, I am of opinion that there is nothing in the present state of the law to prevent their partaking of the benefits thus provided for them. For although the repeal by the statute 53 G. 3, c. 160, of the incapacities and penalties imposed by the earlier statutes, has not made any difference as to the truth or error of their tenets, and cannot, in my opinion, reflect back any light upon Lady *Hewley's* intentions in 1704, it has removed the only obstacle that could have intercepted her bounty if they had been originally objects of it. It is indeed still blasphemy, punishable at common law, scoffingly or irreverently to ridicule or impugn the doctrines of the Christian faith, and no one would be allowed to give or to claim any pecuniary encouragement for such purpose ; yet

any man may, without subjecting himself to any penal consequences, soberly and reverently examine and question the truth of those doctrines which have been assumed as essential to it. And I am not aware of any impediment to the application of any charitable fund for the encouragement of such inquiries.

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Mr. Justice *Coleridge* :—I have had considerable difficulty in making up my mind as to the answer which ought to be given to your Lordships' first question ; and that not on account of any doubt as to the principles on which the answer ought to proceed, but the application of them to the description contained in the deeds referred to. It is unquestionable that the object of all exposition of written instruments must be to ascertain the expressed meaning or intention of the writer, the expressed meaning being equivalent to the intention ; and I believe the authorities to be numerous and clear (too numerous and clear to make it convenient or necessary to cite them), that where language is used in a deed which in its primary meaning is unambiguous, and in which that meaning is not excluded by the context, and is sensible with reference to the extrinsic circumstances in which the writer was placed at the time of writing, such primary meaning must be taken, conclusively, to be that in which the writer used it ; such meaning, in that case, conclusively states the writer's intention, and no evidence is receivable to show that in fact the writer used it in any other sense, or had any other intention. This rule, as I state it, requires perhaps two explanatory observations : the first, that if the language be technical or scientific, and it is used in a matter relating to the art or science to which it belongs, its technical or scientific must be considered its primary

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meaning; the second, that by “sensible with reference to the extrinsic circumstances” is not meant that the extrinsic circumstances make it more or less reasonable or probable is what the writer should have intended; it is enough if those circumstances do not exclude it, that is, deprive the words of all reasonable application according to such primary meaning.

This rule thus explained implies that it is not allowable in the case supposed to adduce any evidence, however strong, to prove an unexpressed intention varying from that which the words used import. This may be open no doubt to the remark, that, although we profess to be exploring the intention of the writer, we may be led in many cases to decide contrary to what can scarcely be doubted to have been the intention, rejecting evidence which may be most satisfactory in the particular instance to prove it. The answer is, that interpreters have to deal with the written expression of the writer's intention, and Courts of Law to carry into effect what he has written, not what it may be surmised, on however probable grounds, that he intended only to have written. The rule, however, whether it be a wise one or not, being established, it follows that a preliminary inquiry to all such questions as that which your Lordships first propose is, what are the terms used with reference to which the extrinsic evidence is offered? Have they primarily a clear unambiguous meaning? Now the words “poor and godly preachers of *Christ's* holy Gospel,” “poor and godly widows of poor and godly preachers of *Christ's* holy Gospel,” “the encouraging or promoting of the preaching of *Christ's* holy Gospel in poor places,” appear to have a clear primary sense. No extrinsic circumstances surrounding the writer of them, if they had been used in the present day, can

be supposed, which would render them insensible according to that primary meaning. Whatever, therefore, might be the creed of the writer, Christian or not, of whatever denomination he might be among professing Christians, he would by these words have expressed the same intention; we should have had to inquire who were, according to the law of the land, preachers of *Christ's* Gospel; and all who were in that sense preachers of it, and poor and godly, would have been fit objects of the foundress's bounty.

In the case supposed, it would have been, I conceive, wholly inadmissible to inquire whether the foundress were of this or that sect, or a member of the Established Church, for the purpose of inferring thence a greater or less probability that she had intended to designate the members of this or that persuasion by these general terms; you could no more do this than you could receive evidence of a direct declaration by her that she had intended exclusively to benefit the members of a particular sect; in either case the effect would be to narrow the meaning of the words used, and so far to violate the expressed, and which must ever be taken to be the real, meaning of the writer.

But in proportion as we are removed from the period in which an author writes, we become less certain of the meaning of the words he uses; we are not sure that at that period the primary meaning of the words was the same as now, for by the primary is not meant the etymological, but that which the ordinary usage of society affixes to it. We are also equally uncertain whether at that period the words did not bear a technical or conventional sense; and whether they were not so used by the writer. The change which the course of events may make in the meaning

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of a word might be not inappropriately instanced in the phrase "holy Scriptures;" no phrase perhaps can now be cited of more unambiguous interpretation. Yet "search the Scriptures," in the New Testament, does not include their most important part, the New Testament itself, simply because when used that part had not been written. But, to come more home to the period to which our attention must be directed, no one can be in the least degree familiar with the divines or historians of the seventeenth century without being aware of their using a large number of common words in a different sense from that in which they are now received.

When, therefore, we are called on to construe deeds of the years 1704 and 1707, it seems to me that we are not only at liberty, but are bound, to inquire what at that time was the meaning of the phrases used in them; not taking for granted, because they bear a certain clear meaning now, that they did so then; and we are also, I conceive, bound to inquire whether at that time they bore any technical or scientific sense; and if so, we must judge from the context whether in the particular instance they were used in that sense. So long as we limit our reception of evidence to what is legitimate, for these inquiries, we do not break in upon the rule above laid down; we are not seeking to show an intention not expressed, but trying to ascertain the meaning of that which has been written. Now the relators in this case contend, in the first place, that the words in question at the date of the deeds bore generally, or at least among a large and well-defined class of professing Christians in *England*, a conventional meaning somewhat narrower than we should give them in ordinary use at this day; and, secondly, that Lady *Hewley* was one of that class;

whence they draw the inference that these words used by her on a subject-matter directly connected with that in which the words bore that secondary meaning, must be taken to have been used in that sense. The syllogism in its form is correct, and the conclusion is relevant; its bearing on the issue is, that it shows the meaning of what Lady *Hewley* has written; they may therefore by all legitimate means prove the premises. I am not aware that any question has been made as to the kind of evidence offered in support of the first proposition or major premise. The rules of evidence must expand with the necessities of the case, or the end for which they are established would be sacrificed to the means; and accordingly it is well known that in what is matter of history, and relates to the public at large, a class of evidence has always been admitted, such as histories and chronicles, which would not be received in an issue upon a matter of private right. Cases to this effect are collected or referred to by Mr. *Phillips* in his "Law of Evidence (*t*)."
Among them I may mention particularly that this House, after argument, in *Warren Hastings's* case, allowed the History of the Growth and Decay of the *Ottoman* Empire, by Prince *Cantemir*, to be read, to prove an universal custom of the Mahommedan religion. Evidence, indeed, of this description was read in great abundance on the hearing of this appeal, by the Appellants as well as Respondents, irregularly of course (and it may be taken to have been by consent), as to the time of its introduction, but not objected to, I believe, as inadmissible in itself.

The struggle, indeed, was made upon the evidence applicable to Lady *Hewley* herself; and I fully con-

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cede, that if it were offered for the purpose of introducing words of exclusion, or any words, into the deeds not already there, or to raise an inference of intention not expressed, it could not properly have been admitted. But your Lordships' question does not suppose any such purpose; and, merely to prove the minor premise, the syllogism, that is, that *Lady Hewley* was one of the class by whom the debated words were commonly used in a certain secondary meaning, all her acts bearing on that subject-matter appear to me properly proveable. Under these I include, or rather they will introduce, the places of worship she frequented, the divines she followed, or with whom she was in habits of friendship, the conditions she imposed expressly on the objects of her bounty; and these will make evidence indirectly of what discloses the nature of those places of worship, the opinions of those divines, their works, and history. It may be that this opens an inconveniently wide range of inquiry; but if the fact sought to be proved is strictly conducive to the proof of the fact in issue in the cause, the objection of irrelevancy does not arise, merely because it is not itself the fact in issue. The extent of the inquiry grows out of the nature of the matter to be inquired into.

Viewed in the light in which I view this evidence, as well that which more directly applies to *Lady Hewley* herself, as that which relates to her friends and advisers, the objection as to time does not seem to me properly to arise. It is said, for example, how can you expound a deed of the year 1704 by a deed of the same party in 1707? How does an intent, expressed ever so clearly, in 1707, conduce to prove an intent existing, but unexpressed, in 1704? My answer is (just observing, that if the interval of time

were very much shorter, I should think the objection of equal force, unless I could make the two deeds parts of one identical transaction), that the deed of 1707 is not used to introduce anything into the deed of 1704 not already written there; but that, in order to understand the language of the deed of 1704, I am seeking to show that Lady *Hewley* was one of a large class by whom certain words used in that deed were commonly used in a particular sense,—the words, by the hypothesis, being capable of that meaning. Now, in order to show her of that class in 1704, it would be unreasonable to limit my proof to the precise day, month, or year of the execution; there is a presumption of consistency of opinion on serious, especially religious, questions. If I were to be called on, even in a criminal proceeding, to show an individual to have been a Roman Catholic on a particular day, it would not, I agree, be enough to show him attending the celebration of mass once ten years before or ten years after the day, but I might surely prove such attendance both before and after, and through the whole course of his life, in order to induce the reasonable conclusion that he was of that faith on the day in question; and if so, the objection taken to each particular step in the induction could not be sustained. I might therefore prove the attendance once ten years before, not as the whole, but as part, of a body of evidence; and thus it is, that the deed of 1707, and the rules and orders, are acts done by Lady *Hewley* conducive (I do not say with what degree of strength), only conducive to the proof of her belonging to a certain religious class.

Again, on the principles I have laid down, it seems to me that such particulars in the evidence as the will of Sir *John Hewley*, or the funeral sermon by Dr.

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Colton, were in strictness admissible, not as declarations by them either of what Lady *Hewley* was or they were, but as acts done by them showing what they were with whom she lived in most confidence, and her belonging to whose class of religionists may fairly be presumed.

I therefore answer your Lordships' first question by saying, that in my opinion the extrinsic evidence was admissible, for the purpose of determining who are entitled under the terms stated in that question to the benefit of Lady *Hewley's* charity. Of course I must be understood as speaking of the evidence in classes, and in its more important details. I do not undertake to say there may not be some unimportant particulars in the large mass received without objection that may not fall in with the principles on which I think the general body admissible. I may mention as instances, such sentences as are to be found here and there in the depositions of witnesses speaking merely of belief founded on tradition and report of the Trinitarian opinions of Lady *Hewley*; these do not go to the proof of either of the propositions on which this case stands, in my judgment, and are objectionable therefore as irrelevant, and also as to the foundation on which they stand.

I take the liberty of changing the order of your Lordships' questions, and observing that in my answer to the first I have incidentally given my answer to the third of them; I take the liberty also of throwing together my answers to the second, fourth, and fifth.

It will be convenient, in the view I take of this case, to answer these three questions together. Considered with reference to the conclusion to which I have come upon the first, these become merely ques-

tions of fact; what inference, namely, is to be drawn from admitted evidence? I am not aware that there can be more than four divisions of Christians who could be conceived as claimants under these deeds,—the Romanists, the members of the Established Church, Trinitarian Dissenters, and those who deny the co-equal and co-eternal Divinity of the second Person in the Trinity. Of these, neither the first nor the second are *de facto* claimants, and with regard to the first it is unnecessary to say a word; every particular in the evidence shows that they could not be reasonably included within the objects of Lady *Hewley's* bounty; but the evidence adduced in the cause has partly for its purpose to exclude the second. Taken by themselves, and understood in their primary sense, which on its face is unambiguous, it could not be contended that there were not many among the clergy of the Established Church “poor and godly preachers of *Christ's* holy Gospel,” or that there were not among the members of that Church persons answering the other descriptions contained in the deed. It is for this, among other reasons, that the relators have, in my opinion, been rightly admitted to prove that the words in truth are not unambiguous, and that they bore among those of whom Lady *Hewley* was one, at the date of the deeds a certain secondary conventional meaning, in which sense she must be taken to have used them, and which sense excludes the Established Church. It is obvious that, although I think the relators rightly entitled to use that evidence, it by no means follows that I should think, as a jurymen, that they have proved their conclusion; and I confess that this was one of the points on which I had and have most difficulty in making up my mind. The evidence on this point is confined

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to the answers to the 17th interrogatory, and I believe only three witnesses have been examined, to wit, Dr. *Pye Smith*, Mr. *Bennett*, and Mr. *Walker*. Of these Dr. *Smith* says, although he states his belief that the terms “were used by the Nonconformists or Protestant Dissenters for the purpose of describing or designating Dissenters and Dissenting ministers, and preachers generally,” yet he adds that he cannot say “whether they were used for the purpose of distinguishing Dissenting ministers and preachers from preachers of the Established Church,” concluding however, with this, “that the said terms were ordinarily appropriated to Dissenting ministers and preachers, and by such ordinary appellation became, to a considerable extent, terms of distinction between them and the members of the Establishment.” Mr. *Bennett*’s evidence is less qualified, both as to the terms being used as descriptive of Dissenters and Dissenting ministers generally, and as distinctive of them from the ministers of the Established Church. But Mr. *Walker*’s evidence bears strongly the other way. He says, “The terms were adopted and employed in the conversations, and writings, and publications of the time by religious persons” (not adding, of any particular persuasion), “to denote those whom they regarded as pious, and specially devoted to the service of God, and by others as a cant term or word of reproach principally against Dissenters and Dissenting ministers or preachers, they being Trinitarians, and none else, for the idea of godliness would not and could not have been attached to any but those who believed the doctrine of the Trinity, and so necessarily embraced all who were Presbyterians, Congregationalists, and Independents, or Particular Baptists;” but he adds that “he is not aware that the said terms

were used merely for the purpose of distinguishing Dissenting ministers and preachers from preachers of the Established Church, ministers in the Established Church not being at that time so likely to be so designated, though there might have been exceptions ;” and he adds his belief, “that, in the senses of the phrase above mentioned, some clergymen of the Established Church would have been liable to it as well as others.”

It must be admitted that this evidence is slight ; and I confess that it does not lead me to a confident conclusion that, upon the received principles of interpretation, ministers and members of the Establishment are not entitled to share in the bounty of *Lady Hewley*. Even this evidence, however, has more strength, when considered with reference to the history of the times. The feelings of irritation consequent upon the Act of Uniformity had hardly subsided ; the spirit of party (a term which I use for want of a better, and in no reproachful sense) was still strong. It is in the nature of party to adopt distinctive appellatives, while it has always been the practice of the Established Church, I think, to disclaim them for herself, especially such as might seem to lay claim to individual spiritual pre-eminence, rather than doctrinal purity. All these circumstances give the evidence, in my opinion, a strong antecedent probability ; and I therefore accede, upon the whole, to what has been very much taken for granted in the arguments, that the ministers and members of the Established Church are not proper objects of the trusts of these deeds.

The claim of those who are commonly called Unitarians now remains to be considered ; for I take it that no one contests the claim of Protestant Trinitarian Dis-

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senters. Now, with regard to these, I might perhaps content myself with stating, that I concur in the opinions which have been now already expressed by one of my learned brothers, that they are not entitled. But as I may arrive at my conclusion by a different course of reasoning, it is fit that I should state it shortly. I am by no means prepared to say, that even in a Court of Law it would not be a just mode of argument to arrive at that conclusion by a theological examination of the words, "godly preachers of *Christ's* holy Gospel;" and if it could be shown, as I have no doubt it could, that the ministers of that persuasion do not in very truth fall within that description, the Judge to whose mind conviction was brought home by that reasoning would be bound to act upon it.

But I feel at once the unnecessary painfulness of relying on such an argument, and my own incompetence to conduct such an inquiry with perfect certainty to myself or conviction to others, that every step I took in it was free from error. I resort, therefore, to the safer course of examining in what sense *Lady Hewley*, as one of a certain class of religionists, must be taken to have used the words in question; what was the meaning of those words in her mouth, and the mouths of those of whom she was one. Most ingenious arguments were used to show that they meant those Christians, of whatever faith as to peculiar doctrines, who agreed in rejecting creeds and articles. I look in vain, in the evidence in the cause, for the slightest support to those arguments. On the contrary, if the evidence of her own acts be looked to, if the acts of her own friends and class be regarded, if history be resorted to, all concur unequivocally in showing that she and they, so far from being indifferent to the holding to the fundamental articles of our

faith, were zealously attached to them, and deemed them as much all-important as the divines of the Established Church.

Again, if I look to the words of the deeds, and consider them with reference to the history of the times, as to the then state of what is commonly called Unitarianism, I see in the former clear indications of an intention to provide for poor and godly members of a body, preachers to congregations, a succession contemplated in a ministry then in being and known, education provided for those who were to come into it; but history discloses that none of these circumstances were then applicable to this sect. I do not think it has been shown that in her day there was a single avowed minister or congregation of that persuasion; in truth those who held the opinions were not only not tolerated, but as a sect had scarcely attracted sufficient notice by their numbers to have become, as it were, objects of special legislative toleration.

But it has been said that though it may be conceded that the Unitarians, as such, were not specially present to Lady *Hewley's* mind as objects of her bounty, and although if they had been, yet, as not being then tolerated, they could not by law have participated in it, still the words she has used are large enough now to comprehend them all, and that her meaning was to embrace all tolerated Protestant Dissenters, and all such as from time to time should become tolerated; that the state of the law alone restrained the complete effectuation of her intention, and that with the removal of legal restraint, the interpretation of her words expands; that if legislation had taken an opposite course and narrowed the limits of toleration, sects which are now within her bounty

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would have been excluded, and that by the same reasoning, as toleration has become more expansive, sects formerly excluded may become admissible.

For the first part of this argument I can see no foundation in fact. The latter, I own, seems to me to rest on an obvious fallacy. As to the first, the only words of a prospective nature in the deeds, "for the time being," clearly have reference to the succession of individual objects or ministers of the charity; and to suppose in *Lady Hewley* such an intention as above stated, is to suppose, in the first place, a far-sightedness of which there is no evidence, and, in the second, an indifference to the faith of any sect which might at any future time be tolerated, of which there is abundant evidence in contradiction. As to the latter branch, it seems to me to confound intention in the founder of a charity with the carrying out of that intention into act. An intention may have become by some statute illegal; the intention would remain the same, but no Courts could then effectuate it. It is a strange inference to draw from this, that something never intended should be carried into effect, merely because, having been illegal, it has, after the founder's death, been legalized. Whether, therefore, I look at the language of the deeds merely, or the state of the law at the time of the execution, or what the evidence and history disclose as to *Lady Hewley* herself and the class to which she belonged, each and all of these lead my mind irresistibly to the conclusion, that your Lordships' fourth question should be answered in the negative. One exception, however, I desire to make to the generality of this; I see no absolute necessity for applying the reasoning before used to the words "godly persons in distress." In respect to them, it seems to me that the language of

the deed is fuller, and leaves the selection of objects to the discretion of the trustees and managers.

My answer to the only remaining question of your Lordships, understanding it to refer, as I do, to charitable foundations similar to Lady *Hewley's*, not the same, is, that ministers or private individuals of the Unitarian persuasion are not, in the present state of the law, disqualified from enjoying the benefit of any such. It appears to me, in order to arrive at this conclusion, not necessary to break in upon any of those *dicta* by which Christianity has been declared parcel of the common law, nor to extend the operation of the different Toleration Acts beyond the literal meaning of their language. But Unitarians profess to be Christians as much, and, we doubt not, as sincerely, as Trinitarians; and I apprehend that there is nothing unlawful at common law in reverently doubting or denying doctrines parcel of Christianity, however fundamental. It would be difficult to draw a line in such matters according to perfect orthodoxy, or to define how far one might depart from it in believing or teaching without offending the law. The only safe, and, as it seems to me, practical rule, is that which I have pointed at, and which depends on the sobriety and reverence and seriousness with which the teaching or believing, however erroneous, are maintained.

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Mr. Justice *Williams*:—My Lords, the first question seems to me to be so intimately connected with the whole subject, and especially that part of it upon which your Lordships wish for any opinion from me, that I shall endeavour, as well as I am able, to answer it so fully as to make it unnecessary to trouble your Lordships at any length upon the subsequent parts of the case.

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This question then, whether the difficulty in answering it be greater or less, admits at least of being very shortly stated, for it resolves itself into this: whether the deed of foundation of the year 1704 be expressed in plain, clear, and unambiguous terms? because, if it be, by an undoubted rule of law (if any such there be), too well known to be dwelt upon for a moment,—a rule applicable not to a deed merely of whatever description, but to every written document,—what is written must be expounded by itself. To those therefore who maintain the affirmative of this proposition, and pursue it consistently, the answer is plain and easy, that all the extrinsic evidence in this case is utterly inadmissible; because, if any be admissible, to draw the line, and to define at what precise point the exclusion shall begin, is more difficult than to hold that none shall be admitted at all. In this view therefore, as I have said, the question admits of an easy solution.

If, on the other hand, the terms of the deed of foundation be in themselves obscure, indefinite, and ambiguous, or become so in the application of them, it is necessary to call in aid extrinsic evidence to arrive at the intention of the founder, which it is the object in all cases to effectuate, if it can be done without violating any known rule of law, and in my humble judgment the deed in question is of the latter description. The very extent to which the words “pious and godly preachers of *Christ's* holy Gospel,” by the supposed and alleged obvious meaning may, or I ought perhaps rather to say must, be carried, raises a doubt in my mind whether that could have been the meaning of *Lady Hewley*, which meaning, I assume it to be clear, it is the object to pursue. The very generality of the language in this case creates the embarrassment and the necessity of limitation. If the words

raising the question are to be taken in their ordinary sense, what is there to hinder an ample selection being made (then or now) from members of the Church of *England*, fulfilling in every particular the prescribed requisites? Why not from amongst priests of the Roman Catholic persuasion? Is it to be doubted that from amongst the latter a selection might be made of "poor and godly preachers of *Christ's* holy Gospel?" and yet in the judgment of four Judges (two of Equity and two of the Common Law) these words have received such an interpretation that in their opinion members of the Church of *England* are excluded; and in the argument of this case at the bar by the learned counsel (now a member of your Lordships' House) an opinion to the same effect was distinctly expressed. Moreover, for the same reason, as I understand, a trustee was by the judgment of the Vice-Chancellor, confirmed by the Lord Chancellor, removed. *A fortiori*, I presume, therefore, would Roman Catholics, according to those judgments and that opinion, be so excluded.

It is not without reason therefore, as I humbly conceive, that I arrive at the conclusion that these words cannot be construed in all their generality, but must be restricted to some extent; and the question is, how much, and by what means; but before I come to this, which at once involves an answer to your Lordships' first question, and as it seems to me to most of the others, it becomes necessary to state very shortly for what purpose and in what manner the extrinsic evidence is applicable. The will of the founder is the thing to be ascertained; that I assume throughout to be without dispute; and in an endeavour to arrive at that, the meaning of particular expressions not generally or in the abstract, but the meaning of those expressions as used in the deed of foundation, is the

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proper subject of inquiry,—in what sense she (the founder) used them ; and upon this point (ascertaining the meaning of a deed) the circumstances of the party making it at that time (the time of making) are admissible generally ; and in this particular case the reason why I consider the extrinsic evidence admissible at all is, that it has a tendency to show the *status* (if I may be allowed the expression) of Lady *Hewley* as to religious opinions, and therefrom to lead to some inference (no matter whether more or less, that regards only the effects) as to the sense in which she employed the words which I have already said are in my opinion indefinite and ambiguous. That *status* (if so it may be called) is in truth a matter of fact, to be determined like any other by evidence applicable to it, evidence varying of course in each case according to the nature of the fact to be established, but still a matter of evidence.

I will, with your Lordships' permission, endeavour to illustrate my meaning by reference to the deed of the year 1707, as to which a distinct question (the third) is proposed. If the language of the earlier deed, of 1704, had not been uncertain, as I think it is, the latter deed, of 1707, would, in my opinion, have been as inadmissible as any deed executed by any other person a century before or after ; but with the object and for the purpose before explained I think that the whole is admissible, though it may be (but this to the point of admissibility is immaterial) that the rules and regulations respecting the almshouses by virtue and in pursuance of the deed of 1707, have the most direct and immediate bearing upon the question. I will here add, that I understood the same learned counsel to whom I have before alluded to consider the second deed as admissible in the view I am taking.

On the remainder of this question I beg leave to answer generally (for I do not consider that your Lordships expect a detailed examination of the whole), that, consistently with the view upon which I consider any of the evidence admissible, I am not aware of any which ought to be rejected, whatever amount of inference may in your Lordships' judgment be deducible therefrom.

That such evidence is for such a purpose admissible in the case of written instruments, is well known. I will advert to one or two out of the numerous instances, which might easily be adduced. It might have been supposed *à priori* that the words, "departing with convoy," applied to a ship setting sail from *England*, had no very mysterious or doubtful meaning; yet in an action upon a policy of insurance from *London* to the *East Indies*, with a warranty that the ship should "depart with convoy," proof was admitted to show that by the custom of merchants that meant "depart from the *Downs*," or in other words that the parties so used them; *Lethulier's Case* (u). If certainty can be affirmed of anything, it surely may respecting number and quantity, and the terms applicable thereto. But in an action of covenant on a lease to leave at the end of the term 10,000 rabbits on a warren, evidence was admitted to show that in that part of the country 1,000 rabbits did not mean ten hundred but twelve; *Smith v. Wilson* (x). So in covenant on a lease to get all the coals lying under certain closes not below the level of the bottom of the mine, proof was admitted to show the sense of level amongst miners, and that it might mean a line above or below the horizontal depth of the bottom of the mine; *Clayton v. Gregson* (y).

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(u) Salk. 443. (x) 3 B. & Ad. 728. (y) 4 N. & M. 602.

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In all these cases the evidence was admitted to show in what sense parties used words, apparently rather more intelligible and precise than the words under consideration before your Lordships.

I will observe, in conclusion (though, where the question of admissibility is distinctly proposed, that I am aware must not be relied upon), that the whole evidence in this case has been three times fully canvassed and discussed without any apparent opposition.

In answer to the second question, I think that Non-conformist ministers, to whom the description of "godly preachers of *Christ's* holy Gospel" can be properly applied, and persons of their persuasion, are the proper objects.

To the fourth question I beg leave to answer, that, understanding as I do the language of the foundation deed, and the belief and doctrine which I collect to be attributed to the Unitarians (though upon this, not being in any degree a legal question, I speak with great uncertainty), I think they are excluded from being objects of the charities of that deed.

I would make the like answer to the fifth question.

In answer to the sixth question, it is sufficient to say that it seems to me that it was the intention of Lady *Hewley* to benefit persons of a particular belief and doctrine, and that therefore any change in the law as to penalties and disabilities, or the removal of them, provided the belief and doctrine be not within such her intention, should make no difference.

If the question be, whether if, hereafter, by any deed of foundation, similar to that of Lady *Hewley's*, Unitarians were so described as to come within the

language of such deed, there be now anything to incapacitate them? my answer is, that I think not.

Mr. Baron *Gurney* :—In answering the questions propounded by your Lordships, I will take together the first and second. In carrying into execution a trust of this description (contained in those questions), the first object must be to ascertain the intention of the founder. If the founder has expressed his or her intention in clear and unambiguous language there is no necessity for resorting to extrinsic evidence; but if the language has, by lapse of time and change of circumstances, become obscure, I think that extrinsic evidence may be resorted to.

Although the term “godly” is too plain to be misunderstood, for we have only to have recourse to our Bible and our Prayer Book to show in what sense it is used, yet the phraseology employed in describing the first and principal object of the founder’s bounty, “poor and godly preachers of *Christ’s* holy Gospel,” appears to me not to be at the present time in that general use which enables the reader of the deed to ascertain with precision the sense and meaning of the founder (except as it may be collected from the state of the law at that time, which is another consideration). If the founder was connected with a religious party, by which this phraseology was employed in a certain sense, I think that it is admissible to inquire what was that party, and in what sense they used this phraseology; and if it can be ascertained in what particular sense the term “godly preachers of *Christ’s* holy Gospel” was used, that may assist in ascertaining the meaning of the term “godly” in other parts of the deeds.

There are parts of these deeds, and of the rules and

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regulations for the hospital, from which I think it may be inferred that Lady *Hewley* was not a member of the Church of *England*, and that she did not by the term “godly preachers of *Christ's* holy Gospel” intend clergymen of the Church of *England* to be the objects of her bounty. The term “preachers” is not one which is applied to clergymen of the Church of *England*. Another provision is for the preaching of *Christ's* holy Gospel in such poor places as the trustees shall think fit. The provisions for the almspeople; their qualifications to be nine poor widows or unmarried persons of a certain age, and a tenth person, who is to be a sober, discreet, and pious poor person, who may be fit to pray daily, twice a day, with the rest of the poor in the almshouse, if such a man can conveniently be found. There is no direction for any form of prayer, and I think it must be understood to speak of extemporary prayer. The almspeople are to attend some Protestant place of worship; and they are to be such as can repeat by heart the Lord's Prayer, the Creed, the Commandments, and (not the Church Catechism, but) the Catechism of Mr. *Edward Bowles*, who is admitted, in the answer of Mr. *Wellbeloved*, to have been a person of note in his day, to have resided at *York*, and with whom Lady *Hewley* in the early part of her life had been acquainted. All these provisions combined appear to me to indicate a foundation not for ministers and members of the Church of *England*, but for ministers and other persons who were Protestant Dissenters.

Still I think it is allowable to throw further light upon the intentions of the founder, if that can be done by evidence respecting herself and the particular religious party with which she was connected, and, if

the phraseology of the deed was that which was in use in that party, to ascertain the sense in which it was used. We do not require any evidence to inform us that there did exist at the time of these deeds a large religious party denominated Protestant Dissenters. I think that it is a legitimate inquiry whether Lady *Hewley* belonged to that party, and whether this was the phraseology of that party, and in what sense it was used, to what description of persons these terms were applied.

It is in evidence, and it is uncontradicted, that the terms “godly ministers,” “godly preachers,” and “godly persons,” were in common use by Protestant Dissenters of that time as applied to their ministers and preachers and members who were considered to be devoted to religion; there is no evidence that at that time this phraseology was employed to designate any other description of persons; there is further evidence that Lady *Hewley* was a Protestant Dissenter, and I think that she must be considered as sincerely attached to the party of which she was a member; that she was zealously affected to religion itself is evident. Piety and benevolence pervade the whole of the dispositions of her deeds.

I think that it is further allowable to show, by extrinsic evidence, what description of persons could not have been, and what description of persons must have been, the objects of Lady *Hewley*’s bounty; and here it is difficult, if not impossible, to distinguish between evidence and history; they run into each other, and they both concur. We learn equally from the evidence and from history that at that time there did exist, as there do now, three denominations of Protestant Dissenters, Presbyterian, Independent (or Congregational), and Baptist; that at that time all

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the three were partakers of one common faith on those great points of doctrine, which theologians have generally considered as fundamental (for the only difference which existed was that of infant baptism), and that those doctrines which were so generally received were irreconcilable with the faith of those who are now commonly denominated Unitarians. There is no trace in the evidence, neither is there any in history or biography, of any minister or preacher of any congregation of Protestant Dissenters in *England* who professed a belief in the doctrines of Unitarianism until nearly, if not quite, half a century after the execution of these deeds.

In the argument at your Lordships' bar the learned counsel took a wide range of theological and historical discussion. It was contended that *Lady Hewley* being of the denomination called Presbyterian, she must be considered as averse from subscription to a test, because that was the prevalent opinion among Presbyterians at that period. If that was so respecting the denomination of Presbyterians, it is remarkable that it is the only point in which *Lady Hewley* appears to have differed from them, for by prescribing the use of *Bowles's* Catechism she manifested her opinion of the propriety of subscription to a test, for it is trifling to imagine that she prescribed the use of it as an exercise of memory and not as a declaration of faith. It was further contended, that she could never have intended to have benefited the members of the sect of Independents by her bounty, because between the Independents and the Presbyterians there had been fierce contentions upon the subject of church government, the Presbyterians having held with government by a Presbytery, and the Independents, the independence of every separate congrega-

tion of which their body was composed. The learned counsel who used this argument did not, I think, advert very correctly to the history of the times. Between the time of those differences and the execution of these deeds, half a century had elapsed, which teemed with important events. The contentions upon the subject of church government, which divided the Presbyterians and Independents, and inflamed them against each other, existed during the latter part of the reign of *Charles* the First, and during the time of the Commonwealth. Each was then struggling for ascendancy. After the passing of the Act of Uniformity, when the Presbyterians had failed in obtaining a comprehension with the Church of *England*, and when all Protestant Dissenters had failed in obtaining toleration, they were all made subject to the same severe laws; they became all sufferers in the same cause; many of them were fellow prisoners in the same gaols; they learned to know each other better, and to love each other more; they learned to think less of the points of difference, and more of the points of agreement. When the Revolution had been accomplished, and the Toleration Act passed, they received one and the same protection, on condition of subscribing the Thirty-nine Articles of the Church of *England*, with the exception of those which related to church discipline and infant baptism; and from that time there is not a trace of those differences upon church government which had divided them so widely in the times to which I have adverted. The Presbyterians, indeed, although they retained the name of Presbyterians, became substantially Independents. They did not subject themselves to the rule of any Presbytery (as the Presbyterians of *Scotland*, with whom they had

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at one time united themselves, still do) ; their congregations became, and were, and remain, each independent of every other ; and to this day this is the case with all congregations of Protestant Dissenters. At the time of the execution of these deeds the three denominations of Protestant Dissenters were united, as I have said before, in one common faith ; and that was, so far as the doctrines in question were concerned, the same as the Church of *England*.

The answer, therefore, which I humbly give to the first and second questions, is, that that part of the evidence adduced in this cause which goes to show the existence of a religious party by which this phraseology was used, and the manner in which it was used, and that Lady *Hewley* was a member of that party, is admissible, for the purpose of determining who are the persons entitled, under the descriptions in these deeds, and that the persons described are ministers, congregations, and pious persons who are Protestant Dissenters, and not Unitarians.

As to the third question propounded by your Lordships ; I do not think that it is necessary to refer to the provisions of the deed of 1707 for the purpose of putting a construction upon the deed of 1704 ; but if it were necessary, I should think that they may be referred to, as it appears to me that the deed of 1707 is neither more nor less than the completion of the plan of Lady *Hewley* for the application of her property to pious uses. I consider the whole as one transaction. The persons who were to carry into execution the trusts of the deed of 1707 were the same, with the addition of subordinate trustees. The deed conveys a hospital, then “ recently erected,” and which probably was in contemplation at

the time

of the execution of the deed of 1704, if not then commenced.

On the fourth question, “ Whether, upon the true construction of the deed of 1704, ministers or preachers of what is called Unitarian belief and doctrine are excluded ? ” I am of opinion that they are excluded, (not on account of any opinion of my own respecting the soundness or unsoundness of their belief and doctrine, for I utterly disclaim founding my judgment on any such basis, but) on account of the state of the law at the time this charity was founded.

The Act of Toleration by the 17th section provides, that neither this Act, nor any clause, article, or thing herein contained, shall extend to give any ease, benefit, or advantage to any Papist or popish recusant, or any person that *shall deny* in his preaching or writing the doctrine of the blessed Trinity as it is declared in the aforesaid articles of religion (the Thirty-nine Articles of the Church of *England*) : And the statute 9th & 10th of *Will.* 3, c. 32, enacts, that if any person, having been educated in or at any time having made profession of the Christian religion within this realm, shall, by writing, printing, teaching, or advised speaking, deny any one of the persons of the holy Trinity to be God, and shall upon indictment or information be thereof lawfully convicted, such person shall, for the first offence, be incapacitated for office, and if a second time convicted, in addition to civil incapacities, shall suffer imprisonment for three years. So the law stood when these deeds were executed.

There is nothing in the deeds which gives the least countenance to the supposition that Lady *Hewley* intended to give to persons who could not legally receive. Preachers of Unitarian belief and doctrine,

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if there had been any such at the time (which there were not), would not have been tolerated, and could not in my opinion have been the objects of Lady *Hewley's* bounty. The objects of her bounty I consider to be, such Protestant Dissenting preachers as were at that time within the protection of the Toleration Act. It would be most extravagant to suppose that Lady *Hewley*, by her description of "godly preachers of *Christ's* holy Gospel," meant to describe persons who were considered by the law at that time as guilty of blasphemy.

The fifth question propounded by your Lordships is the same, as to the deed of 1707.

I am of opinion that persons of Unitarian belief and doctrine are excluded from being objects of the charities of these deeds. The rules and regulations established by Lady *Hewley* require that the almspeople shall be able to repeat by heart (which I understand to mean to repeat believingly) the Lord's Prayer, the Commandments, the Creed, and *Bowles's* Catechism. *Bowles's* Catechism is inconsistent with the belief and doctrine of the Unitarians.

It has, however, been contended, that however incapable persons of Unitarian belief and doctrine were at the time of the execution of these deeds, yet as the law now stands they are not incapacitated, and that it is all in the discretion of the trustees. The statutes which have passed since are the 19th of *Geo. 3*, c. 44, and the 53d of *Geo. 3*, c. 180. By the 19th *Geo. 3*, the Legislature relaxed the terms of subscription for Protestant Dissenting ministers: instead of subscribing the Articles of the Church of *England*, they were allowed to subscribe a general declaration of their belief that the Scriptures of the Old and New Testament as commonly received among Protestant

Churches contain the revealed will of God, and that they receive the same as the rule of their doctrine and practice; and on subscribing this declaration they became entitled to all the exemptions, benefits, privileges, and advantages granted to Protestant Dissenting ministers by the Toleration Act. But this statute left the exception of those who denied the doctrine of the Trinity unrepealed; this exception, however, and the penal enactment in the 9th & 10th of *Will.* 3, have both been repealed by the 19th of *Geo.* 3, and the law as respecting all Protestant Dissenters is now the same.

I cannot see how this removal of incapacity for taking the benefit of such charities as may now be founded for their benefit can make them the objects of a charity which was not founded for their benefit, and which could not then legally be founded for their benefit. I think the investing of the trustees with the power of applying this trust to the promotion of Unitarian worship would be the greatest possible perversion of the trust.

I have always considered the intention of the founder to be the principle to be established,—the rule to be abided by; and I think the language of Lord Chancellor *Eldon*, in *The Attorney-general v. Pearson* (z), gives the rule very distinctly. The information in that case was filed in the year 1817,—four years after the Act of the 53d of *Geo.* 3 had passed,—for the purpose of removing the trustees of a meeting-house, the foundation deed of which was dated in 1701, and the purpose declared was the most general possible, “for the worship and service of God.” In process of time the trustees had become Unitarian, and the counsel for those trustees urged the same

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(z) 3 *Merivale*, 353; see p. 410.

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arguments that have been urged at your Lordships' bar, that whatever disabilities might have existed at the time when the meeting-house was founded, they were removed by the statute of 53 *Geo. 3*, that all was left to the discretion of the trustees, and that the trustees were at liberty to make use of the meeting-house for the purpose of teaching the doctrines of the Unitarians. Lord *Eldon* says, "From these deeds I can collect that the founders were Protestant Dissenters, and thence presume that their object was the Protestant Dissenting worship. But I have nothing to inform me what species of doctrine this institution was intended to maintain, except as I may infer from a provision for the case of any future law prohibiting the worship intended to be established, from which it appears that the founders meant to establish an institution which was not then contrary to the law, and that they did not mean to invest in the trustees any right to vary the system or plan of doctrinal teaching which was to be maintained in this meeting-house, according to their own discretion. I think that it would be doing violence to all the principles of construction, upon which we act, to understand the clause investing the trustees with power of making orders from time to time, as meaning that the trustees should have power to convert the meeting-house whenever they thought proper to a meeting-house of a different description, and for teaching different doctrines from those of the persons who founded it."

The sixth question is, "Whether such ministers, preachers, widows, and persons are in the present state of the law incapable of partaking of such charities, or any and which of them." I am of opinion, and in that I believe we all concur, that they are not incapable.

Mr. Baron *Parke* :—Before I answer the first of your Lordships' questions, I wish to premise, that I conceive it to be perfectly clear, that in determining who are entitled to the benefit of a charity by virtue of a deed or will, precisely the same rules are to be followed as to the admission of extrinsic evidence, as in construing any other deed or will. The intent of the founder is to be ascertained from the meaning of the words in the instrument of foundation alone, with the aid of such extrinsic evidence as the law permits to be used, in order to enable a Court to discover the meaning of the terms of any written instrument, and to apply them to the facts. Whether the instrument constitutes a trust for charitable purposes, and those either of a religious nature or not, or is executed for some private object of the parties to the deed, the extrinsic evidence admitted in order to construe it must be subject to the same rules, and confined within the same limits.

This being assumed, as a matter which cannot be controverted, I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present inquiry), and which are clearly admissible in every case for the purpose of enabling a Court to construe any written instrument, and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand, it is competent to receive evidence of the proper meaning of that language, as when it is written in a foreign tongue; but it is also competent, where technical words or peculiar terms, or indeed any expressions are used, which at the time the instrument was written had acquired an appropriate meaning, either generally or by local usage, or amongst particular classes.

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The authorities in support of this position are, *The Attorney-general v. The Plate Glass Company* (a); *Goblett v. Beechy* (b); *Smith v. Wilson* (c); *Richardson v. Wilson* (d); and *Clayton v. Gregson* (e).

This description of evidence is admissible, in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz. every material fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be in the situation of the parties to it. The authorities for this position are also numerous; they are referred to in Vice-Chancellor *Wigram's* excellent Treatise on the Admission of Extrinsic Evidence, under the fifth proposition (f). From the context of the instrument, and from these two descriptions of evidence, with such circumstances as by law the Court, without evidence, may of itself notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed, from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible; the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written. The excepted cases

(a) 1 Anstr. 39.
 (b) 3 Sim. 24.
 (c) 3 Barn. & Ad. 728.

(d) 4 Barn. & Ad. 787.
 (e) 5 Adol. & E. 302.
 (f) P. 53. (3d edit.)

in which such evidence is admissible, if indeed there be more than one excepted case (that is, where there are two subjects, or two objects, both described in the instrument, and each equally agreeing with it), having no bearing whatever on the present question.

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These being, I conceive, the only rules applicable to the present inquiry, I proceed to the question, whether the extrinsic evidence adduced in this case, or what part of it, was admissible? In the first place, though the words "godly preachers of *Christ's* holy Gospel" are without any evidence intelligible, yet, according to the first rule above referred to, extrinsic evidence was by law admissible to show that these terms had acquired by usage a peculiar meaning, either amongst a particular class to which *Lady Hewley* belonged, or in the peculiar locality where she dwelt, or perhaps generally throughout the kingdom, at the particular time the deed was executed; or the Court might have informed itself from history, and other general sources of information, of the meaning of the language used at that particular time; for there are authorities in which it has been laid down, that the Court may take notice of the meaning of all *English* words, and even those used in particular parts of the country, in a different sense from their ordinary sense (*g*). Evidence was therefore admissible, that amongst Protestant Dissenters, or a peculiar sect of them, or generally amongst all persons at that time, these words, though of a general nature, and applicable *prima facie* to all poor and godly preachers of *Christ's* holy Gospel, and of course including the ministers of the Established Church, had acquired a more limited meaning, and were confined to a certain description only of such

(*g*) 1 Rolle's Ab. p. 86, Plac. 1; and p. 525, Plac. 7.

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preachers; and supposing it to have been proved that a particular class had always used and understood these words in a restricted sense, it would have been unquestionably permitted to prove that Lady *Hewley* belonged to that class. When the appropriate meaning of these expressions has been established by competent evidence, then the deed is to be read as if the equivalent expressions were substituted, and no further evidence of the peculiar sect or religious opinions, or any other circumstance attending the parties to the deed, is admissible to control or limit their meaning.

Such evidence is not, in my judgment, material to enable the Court to construe the deed within the meaning of the second rule. Upon this question also, the analogous authorities are clear and decisive. In *Goodinge v. Goodinge* (*h*), there was a bequest to such of the testator's nearest relations as the executors should think poor and objects of charity. Lord *Hardwicke* rejected evidence to show that the testator meant to use general words in this or that particular sense. In like manner, in *Edge v. Salisbury* (*i*), *Green v. Howard* (*k*), and in *Strode v. Russell* (*l*), parol evidence under similar circumstances was refused. So in this case, if it had been established by conclusive evidence, or from other legitimate sources, that the words "godly preachers" had meant "Protestant Dissenting ministers," no parol declaration of Lady *Hewley* that she intended only a particular class or sect, or individuals with particular opinions, would have been admissible; nor could evidence of her conduct, character, habits, or opinions, have been receivable to raise an inference of such intention. The deed must speak for itself, no matter what she intended to

(*h*) 1 Ves. sen. 231.
 (*i*) Amb. 70.

(*k*) 1 Bro. C. C. 31.
 (*l*) 2 Nev. 621.

have done, even though it should be proved from her own mouth; still less what it may be supposed she would have wished to have done. The sole question is, what is the meaning of the words in the deed? and if these, of themselves, or with the aid of evidence of a peculiar signification attached by usage, mean all of a certain class, for instance, all such Protestant Dissenting ministers as the trustees should from time to time select, it matters not that her own religious opinions would make such a disposition unlikely; it is a case of *quod voluit non dixit*.

This observation applies equally wherever general terms are used in a deed; their meaning cannot be limited by proof of any intention of the individual party, whether expressed in words, or implied from conduct, habit, or character; and if they be not limited on the face of the deed itself, the general words must be carried into effect, and their construction must be the same, whoever the parties to the deed may be. I will add, by way of illustration, a case suggested by my brother *Rolfe*, then Solicitor-general, in his very able argument at your Lordships' bar, which places this matter in a clear point of view: A hospital is founded by a physician, with a direction to the trustees to nominate and give salaries to such physicians or medical practitioners as they should from time to time think fit: are these medical men to be necessarily such as agree in theoretical opinions with the founder? The answer is not difficult, and it seems clear that these general words must have the same construction, whether the founder were a physician, with one class of opinions on medical subjects, or another, or indeed whether he be a physician or not.

Having made these observations, I proceed to give

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my answer to the first question proposed by your Lordships. I must own that I much doubt whether any of the evidence offered in the case to explain the meaning of the general words used was admissible. The sermon of Dr. Colton, and the will of Sir *John Hewley*, were clearly inadmissible to prove the religious opinions of Lady *Hewley*; and the parol testimony of Dr. *Pye Smith*, Dr. *Bennett*, and Mr. *Walker*, to the 17th interrogatory, which they founded upon their acquaintance with various publications of that day, I hardly think, can range itself within the class of cases in which the opinion of men of science or skill is admitted on a question of science or art. But this inquiry would not be very material, if from the above-mentioned sources of information, which are equally open to the Court as to the witnesses, it appeared that the general terms "godly preachers of *Christ's* holy Gospel" had acquired a peculiar meaning when used by Protestant Dissenters. I am inclined to think that it does so appear; and that these words used by Dissenters do not comprise members of the Church of *England*, and if so, I am of opinion that evidence of Lady *Hewley* being a Protestant Dissenter was properly admitted, though some of it was not of an admissible character, but not the evidence offered for the purpose of showing that she was a Trinitarian Dissenter.

The second question proposed by your Lordships is, "If such evidence be admissible, what description of ministers, congregations, and poor persons are proper objects of the two deeds respectively?"

It appears to me that, coupling the evidence which I have before stated to be admissible, of Lady *Hewley* being a Protestant Dissenter, and the usage since the

time that the deed of 1704 came into operation, by which members of the Church of *England* have uniformly been excluded, the term "godly preachers," &c. used by her, meant a class of persons not of the Church of *England*; and I infer this partly from the use of the term godly, partly from that of the word poor, which may have been used in the sense of unendowed, principally because the term preachers was not usually applied to the ministers of the Church of *England*, who had their liturgy and homilies, but rather to those who looked on preaching as the principal, and the most effectual means of extending the influence of religion. I have no doubt, also, that ministers of the Roman Catholic faith were not included in that term. Protestant Dissenters, therefore, alone are the proper objects of the charity: but who are the class of Protestant Dissenters who are entitled under this provision, is a question I feel no small difficulty in determining, after much consideration of the case. Is the charity to be confined to those persons who should "from time to time" belong to the class who in 1704 answered the description of poor and godly preachers of *Christ's* holy Gospel; or is it to be extended to all such then or at any future time answering the description of godly preachers of the Gospel; and if the former be the true construction, who are the Protestant Dissenters, that in 1704 were designated by the deed as godly preachers of *Christ's* holy Gospel? Did that description comprise all, not within the pale of the Church, who, being Protestants, and pious, and poor, preached the Gospel of *Jesus Christ* as containing the revealed will of God, and the rule of doctrine and practice, expounding it according to their own opinions; or is it to be confined to one class only of these, or extended to all,

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with the exception of a particular class? It is on this part of the case I have felt, and still feel, much doubt; but I incline to think that the former is the true construction, and that it is more reasonable to hold that the founder had the then state of religious opinions in her view, and did not contemplate any change, and meant therefore to bestow her bounty on all that should from time to time belong to the class which was then designated as godly preachers of *Christ's* holy Gospel, or such as should be from time to time poor and godly preachers of what was then understood by the term of "*Christ's* holy Gospel." And if we so read the words of the instrument, I can have very little difficulty in saying, that those who impugned the doctrine of the holy Trinity did not at the date of the deed answer this description, as it was then generally understood in the Christian world; and I need no better evidence of that fact than the recital in the statute, 9th & 10th of *Will.* 3, c. 32, passed in the year 1698, which states such opinions to be blasphemous and impious, and contrary to the doctrines and principles of the Christian religion, and greatly tending to the dishonour of Almighty God.

Proceeding then on this ground, that the words of the deed, as we may presume they were then generally understood, did not comprise those who impugned the doctrine of the holy Trinity, not because they were not then tolerated by the law, I concur in the opinion already expressed on this question by the majority of my brethren, and think that the charity is to be confined to Protestant Trinitarian Dissenters. If the words of the deed had been those (to which it was contended in the arguments used at your Lordships' bar that they were equivalent), namely, "such Protestant Dissenting ministers as from time to time

the trustees should select," then I should have had little doubt but that the trustees might have selected any of that persuasion whom the law tolerated; the only obstacle to the power of selection from the whole body of such ministers having been at the date of the deed the prohibition of the law, and as the obstacle was from time to time removed, the power of the trustees would have been extended; and on that supposition ministers of Unitarian principles would now have been eligible, since the Act of the 53d of *Geo.* 3 has repealed all penalties against them; and I think that the mere preaching of Unitarian doctrines was not prohibited by the common law; but I do not, for the reasons I have before given, interpret the expression, "poor and godly preachers of *Christ's* holy Gospel," to mean simply Protestant Dissenting ministers.

The meaning of this term, "poor and godly preachers," having been settled, it does not appear to me that there is much difficulty in ascertaining the other objects of Lady *Hewley's* bounty. The widows must be those of Protestant Dissenting ministers as above described. The preaching of *Christ's* holy Gospel, which the trustees are to promote, and the ministry of *Christ's* holy Gospel, for which young men are to be educated, would seem to have the same meaning, that is, the preaching and ministry by Protestant Trinitarian Dissenters; and godly persons, generally, being fit objects of the charity, must, I rather think, by reason of these last words, be those of the same persuasion.

The poor persons who are to be admitted into the almshouse are clearly defined by the terms of the deed of 1707, and the rules made by Lady *Hewley* pursuant thereto. They must be Protestants. They

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must be able to repeat the Lord's Prayer, Creed, Ten Commandments, and Mr. *Edward Bowles's* Catechism, and they must of course believe in the doctrines contained in the Creed and Catechism. If they are Protestants, though they may be of the Church of *England*, who do conscientiously believe in those doctrines, they are admissible; if they do not, they are incapable of partaking of this branch of the charity.

In answer to the third question, I am of opinion that as the deed of 1704 was complete in itself, and no power reserved to alter or vary the trusts of it, that deed must be construed by itself, and without any aid from the deed of 1707; and therefore that none of the provisions of the latter deed can be referred to for this purpose.

My answer to the fourth question proposed by your Lordships is already given, in assigning my reasons for the answer to the second. I am inclined to think that ministers and preachers of what is called Unitarian belief and doctrine, and their widows, and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed; the deed of 1704.

In answer to the fifth question, I have to state that I am of opinion that Unitarians, who do not conscientiously believe the doctrines in the Creed and *Edward Bowles's* Catechism, are excluded from the benefit of the charities of the deed of 1707; and I collect, from the answer and evidence in the case, that the generality of that body do not believe in the doc-

trine of original sin and the atonement, in the sense in which these terms are used in that Catechism, and therefore are not proper objects of this branch of the charity.

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Upon the sixth and last question, I agree entirely with all my brethren, that if Unitarians are not excluded by the true construction of the terms of the deeds, the present state of the law does not exclude them; that is, the preaching of doctrines called Unitarian is not, on that account, illegal at common law, and all the statutory penalties have been repealed.

Lord Chief Justice *Tindal*:—My Lords, before I proceed to state what appear to me, on the best consideration I can bring to this important case, the proper answers to be given to the several questions proposed by your Lordships to Her Majesty's Judges, I think it desirable, for the purpose of making those answers more intelligible and precise, and of avoiding, at the same time, needless repetition, to state generally upon what grounds, and within what limits, I conceive parol evidence admissible to explain the meaning of the words used in a written instrument, so far, at least, as the consideration of that question applies to the circumstances of the present case.

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The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that in such case evidence

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dehors the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself.

The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired in the present age a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which

in many instances use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument, and to carry such real meaning into effect.

But whilst evidence is admissible in these instances for the purpose of making the written instrument speak for itself, which without such evidence would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political, or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to; it would be evidence which in most instances could not be met or counter-vailed by any of an opposite bearing or tendency, and would in effect cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed.

And I conceive it is upon the proper application of

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this rule to the facts of the present case that the answers to the several questions proposed by your Lordships ought to be founded; all of which appear to be framed for the purpose of solving the general problem, what was Lady *Hewley's* intention as expressed in the deeds of 1704 and 1707, and what description or classes of persons were the objects of her bounty at the time those deeds were respectively executed? For whatever was her intention then, whoever were the persons intended to take at the time of the execution of those deeds, the same must be the construction of her intention now, and the same her objects at the present day.

Keeping in view these general observations, I would beg to state, in answer to the first question proposed by your Lordships, viz. "Whether the extrinsic evidence adduced in this cause, or what part of it, is admissible for the purpose of determining who are entitled, under the particular terms and descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady *Hewley's* bounty?" that I conceive, when a doubt has been once raised as to the meaning of these words, that is, in the present case, as to the persons intended by Lady *Hewley* under the terms, "godly preachers of *Christ's* holy Gospel," "godly persons," and the other expressions, the Court by which that doubt is to be decided, has a right to inform itself, and is bound, if possible, to learn, what was the acknowledged and received sense and meaning which those expressions bore at the time when Lady *Hewley* lived, and as near as may be at the time of the execution of those deeds; and for that purpose that all extrinsic evidence calculated to throw light upon the meaning of those words at that time is clearly admissible. Of that description are, public records and

documents throwing light upon the religious history of the times; the language of the statute books and every enactment relating to the state and condition of the Church and of the religious sects then known in *England*; contemporary history; contemporary treatises and tracts upon the religious tenets held by the different sects; the works of men of acknowledged eminence and weight in their respective persuasions, and published and circulated at that period; and the early and contemporaneous application of the funds of the charity itself by the original trustees under the deeds. All extrinsic evidence of this nature, which must be considered, both from the arguments of counsel at your Lordship's bar, and from the reference made thereto in their judgments by the learned Judges in the Court below, to have been actually applied in the determination of the case, though not formally tendered, was strictly and properly admissible for the purpose of explaining the sense in which the language contained in the deeds was used at the time, and in which it is now to be construed.

But, as the evidence which I have just described, is evidence which is presumed to be in the mind of the Judge or Court, it is evidence which they furnish to themselves by reading, research, and reflection, not that which they receive from the mouth of witnesses; and on this account I think all the extrinsic evidence which was actually given in the cause for the purpose of determining who were entitled under the terms "godly preachers of *Christ's* holy Gospel," and the other expressions used in the deeds, was inadmissible. Such, for instance, as the evidence of Dr. *Pye Smith* and Dr. *Bennett* as to the religious opinions of the Presbyterians and of other Protestant Dissenters in the time of Lady *Hewley*; their interpretation of the terms

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used in the deeds; and their evidence of the religious opinions of Lady *Hewley* herself. The production also of the will of Sir *John Hewley* and of Lady *Hewley*, in proof of the private religious opinions of Lady *Hewley*, appears to me, both in respect to the point to which they were produced, and to the character of the evidence itself, not admissible by law. It is unnecessary, however, to specify each particular article of the evidence produced, after having traced out the general nature of the evidence on which alone I think the construction of the deeds ought to depend.

My Lords, in answer to the second question submitted to us, viz. "What description of persons are the proper objects of the trusts of those deeds respectively?" and applying to that question no other evidence than that which I conceive to be admissible for the construction of the trust deeds, I think it may be satisfactorily concluded that at the time of the execution of those deeds, the words "godly preachers of *Christ's* holy Gospel," and "godly ministers," had acquired generally in *England*, a particular and limited meaning, and were used to point out and designate those acknowledged classes of Protestant Dissenters from the Established Church who were at that time tolerated by law. The words, indeed, if taken separately and singly, would undoubtedly, in their literal meaning, be large enough to comprehend all men of pious and godly habits of life, who preached the true doctrines of the holy Gospel, of whatever church or persuasion they might be, whether priests of the Church of *Rome*, or beneficed clergy of the Established Church in *England*, or Dissenters from that church of every denomination, provided only they possessed the two requisites or

conditions, viz. that they were men of godly habits of life, and preached the true Gospel of *Christ*; and the words themselves, taken singly and separately, do not appear to have varied in any degree from their original meaning. The word "godly," for some centuries before the time of Lady *Hewley*, had been used in many passages in the translation of the Bible, and had been read daily in the confession of sins, set forth in the Liturgy, precisely in the same sense which it bore in the times of Lady *Hewley*, and in the same sense has it continued to be read down to the present day; and again, "the holy Gospel of *Christ*," it is unnecessary to observe, is in its own nature unchanged and unchangeable. But, notwithstanding that the original sense of the separate words is retained to the present day, it appears beyond doubt, on reference to the public history of former times, that the phrases above referred to had obtained generally in *England*, long before the date of the foundation deeds, a less extensive signification. The term "godly" had been originally applied by the Puritans to the preachers approved by them, and at the time of Lady *Hewley* had descended to those who at that time formed the body of Nonconformist Dissenters from the Established Church. "Preachers," again, was a term which in Lady *Hewley*'s time was affected by the Dissenters from the Established Church, who considered themselves rather as persons whose mission was to preach the Gospel, than to minister the ordinances and lead the devotion of the people; and indeed in the Act of Toleration these very persons are described as "preachers and teachers." And lastly, the word "poor" did, in a most especial manner, point at those for whom no public provision was made by the State, but who subsisted

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on the voluntary contributions of their respective flocks.

I consider, therefore, at the time of the execution of these deeds, the phrase "godly preachers of *Christ's* holy Gospel," had acquired the new and particular sense of preachers of the different classes of Protestant Dissenters from the Established Church, who professed and preached what were generally acknowledged at that time to be the doctrines of the holy Gospel of *Christ*, and who were then tolerated by the law of the land; and which classes, it is well known, were at that time divided amongst themselves into the Presbyterians, the Independents or Congregationalists, and the Baptists, all of whom were believers in the doctrine of the holy Trinity.

It is possible also, that at the precise period of the execution of these deeds, there might be some members of the Church of *England* still existing who had either voluntarily quitted their benefices or had been ejected from them on account of scruples of conscience, first during the reign of *Charles* the Second, on the ground of nonconformity, and afterwards at the period of the Revolution on account of their refusal to take the oaths to the new Government, and that these persons might also at that time be held to fall within the scope of Lady *Hewley's* bounty. But it is obviously unnecessary at the present time to enter into any minute discussion on that point. After this explanation of the words "godly preachers," I cannot conceive any doubt can exist as to the description of the widows and young men intended for the ministry, who are mentioned in the deed; and with respect to the persons described in the deed of 1704 under the terms of "such godly persons in distress, being fit objects of the said charity, as the

said trustees shall think fit," I should think that these words, accompanying and following the former, would be construed in conformity with them, and be intended to mean persons of the same persuasion, or professing the same religious principles with the more immediate objects of the trust; or at the least that such persons would be entitled to a preference before others in the administration of the funds. And lastly, as to the persons entitled to receive the bounty of Lady *Hewley's* deed of 1707, namely, persons placed in the almshouse founded by her, I think those persons are marked out more clearly and definitely to be such as at that time were members of some of the bodies of Protestant Dissenters from the Established Church before described; for the test which is prescribed by the rules of Lady *Hewley*, as to their admission, "that every almsbody must be able to repeat by heart the Lord's Prayer, the Creed, and Ten Commandments, and Mr. *Edward Bowles's* Catechism," and the direction that the inmates were duly to repair to "some religious assembly of the Protestant religion every Lord's-day, forenoon and afternoon," lead to the necessary conclusion, that, on the one hand, the foundation was not intended for persons of the Established Church, and, on the other, that it was confined to the members of the bodies of Dissenters which were known and acknowledged in fact as such bodies, and recognised and tolerated by law.

In answer to the third question proposed by your Lordships, I beg to state my opinion to be, that in putting a construction upon the deed of 1704, the provisions of the deed of 1707 cannot be referred to. By the deed of 1704 the property contained in it is conveyed

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absolutely to trustees upon certain trusts therein contained; the deed of 1707 conveys property of Lady *Hewley* to the same persons, indeed, as are named in the deed of 1704, but other and different property, and upon other and different trusts. If the latter deed had recited or in any manner whatever referred to the deed of 1704, the two deeds might then have been considered as made *in pari materia*, or in effect as forming one deed; and the deed of 1707 might then have been directly and immediately appealed to, as explaining the intention of the foundress of the charity under the first deed. But the second deed is so far from containing any recital or reference to the first, that in the provision for applying the residue of the rents, the deed of 1707, instead of referring to the trusts of the deed of 1704, repeats them again in terms. I therefore conceive them to be perfectly independent deeds, and can see no legal principle of construction by which the provisions of the latter deed can be called in aid of the construction of the former, which is the only point to which your Lordships' third question adverts.

In answer to the fourth and fifth questions, namely, "Whether, upon the true construction of the two deeds, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of those deeds respectively?" the opinion at which I have arrived, founded upon that which appears to me to be the true principle of construction of those deeds, is, that ministers and preachers of what is commonly called Unitarian belief and doctrine, and their widows,

and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being the objects of the charities of both those deeds. First, taking the deed of 1704 by itself, I think the objects of it are limited to the ministers and others of the several bodies of Protestant Dissenters from the Established Church which were generally known, established, and tolerated at the time the deed took effect; and I am unable to find any proof, from any authentic source, that the Unitarians did form, in fact, at that time, a body or class of Protestant Dissenters, known and established in the kingdom. On the contrary, so far as can be inferred from the evidence produced or any other evidence of an historical nature, the Unitarians, as a body of persons of known religious tenets in *England*, were unknown until a period much later than the execution of either of the deeds in question; but further, so far were the persons who preached Unitarian doctrines from forming a religious body then known and acknowledged in the kingdom, that at the time of the execution of these very deeds, such persons could not avail themselves of the benefit of the Toleration Act, 1 *W. & M.*, c. 18, on the ground of their being persons who denied the doctrine of the Trinity, and under the statute 9 & 10 *W.* 3, c. 32, were at that time liable to certain penalties and disabilities, if by writing or teaching they denied the doctrine of the Trinity. When, therefore, in the deed of 1704, provision is made for the "godly preachers of *Christ's* holy Gospel," I think the answer to your Lordships' fourth question must be in the affirmative; first, because there were existing at the time certain bodies of Protestant Dissenters, well known and ascertained, who preached doctrines which

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had been generally understood and believed in all ages of the Church, and were also generally acknowledged at the time of the execution of the deed of 1704 to be the holy Gospel of *Christ*, of which bodies the Unitarians did not at that time constitute one; and as the deed was so framed that the trusts were to take immediate effect and operation, it must be held to apply to the preachers and others of such bodies only which did then actually exist, and at that time answer the description in the deed: And secondly, because the deed describes the persons who are to take to be the preachers of "the holy Gospel of *Christ*," and it is undeniable that at the time of the execution of this deed, both the Church of *England* as by law established, and all the known classes or bodies into which Protestant Dissenters were divided, held the doctrine of the Trinity to be a fundamental part of their faith, that is, of the holy Gospel of *Christ*; and that at the time of the execution of that deed the Legislature also considered the belief in the doctrine of the Trinity as essential to the description of a preacher of *Christ's* holy Gospel, punishing those who preached doctrines which denied it.

If the persons who believe and preach Unitarian doctrines are excluded from the benefit of the deed of 1704, I think they are more clearly and unequivocally excluded by the deed of 1707; for by the rules and orders given by Lady *Hewley* for the regulation of the poor persons to be placed in the almshouse, which rules, being made by Lady *Hewley* under a power reserved by her in the deed itself and therein expressly referred to, may beyond doubt be called in aid in the interpretation of the meaning of that deed, it is directed that "every almsbody is required to be one who can repeat by heart the Lord's Prayer, the

Creed, and Ten Commandments, and Mr. *Edward Bowles's* Catechism :” which regulations appear to my mind to prove beyond any doubt that the foundress intended the inmates of the hospital and the other objects of her charity under that deed, to be persons who believed in the doctrine of the holy Trinity. And referring myself to the evidence given in this cause of the Unitarian belief and doctrine as to the divinity of *Christ*, I cannot understand that any person professing those doctrines could honestly or conscientiously repeat by heart, that is, express his belief in the doctrines contained in the Catechism of Mr. *Edward Bowles*. And if it had been necessary to determine the intentions of Lady *Hewley* as to the doctrinal belief of the inmates of her hospital without reference to the Catechism of *Bowles*, it must not be forgotten that upon the authority of two eminent persons, well known at the time in question, I mean Dr. *Barrow* and Mr. *Baxter*, the doctrine of the divinity of *Christ* was held to be sufficiently acknowledged as a matter of belief by those who received the Apostles’ Creed alone (*m*). And the weight of the observation for the present purpose consists, not so much in the consideration of the truth of the conclusion at which *Barrow* and *Baxter* have arrived, as in the proof it affords of the fact, that by all bodies of Christians by whom the Apostles’ Creed was received, that is, in *England*, by the members of the Established Church, and of all the Dissenting communities then known, the doctrine of the holy Trinity was also received and believed ; and it is by the current acknowledged use

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(*m*) *Barrow's* Treat. on the Creed, under the clause “ His only Son,” and *Baxter* in his Treat. “ Directions for Weak Christians,” part ii. section 53. 1.

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of language at that day that this deed is to be construed. In the latter deed, therefore, I think, *Lady Hewley* expresses her clear and undoubted intention that no Protestant Dissenter who denies the divinity of *Christ*, that is, no Unitarian, shall partake of her bounty.

My Lords, in answer to the last question proposed by your Lordships, I would state my opinion to be, that Unitarian preachers, and their widows, and other persons professing Unitarian doctrines, are capable, at the present day, of receiving the benefit of charities similar to those mentioned in the deeds of *Lady Hewley*, whenever they shall be properly described in any deeds of endowment; and that I see no distinction to be drawn between charities of one description or for one purpose and those for any other, for I consider, since the statute of 53 *Geo.* 3, c. 160, all distinction between Unitarians and other Protestant Dissenters as to this purpose is by law taken away.

The *Lord Chancellor*:—I move your Lordships, that the further consideration of this case be postponed, that your Lordships may have time to review the very elaborate arguments contained in the opinions of the learned Judges.

Lord *Brougham*:—I entirely agree with my noble and learned friend. The learned Judges, in the case of *Doe v. Perratt* (*n*), and of *Shore v. Wilson*, have presented to us most able and elaborate arguments, and afforded us the greatest assistance in forming our final judgment in these cases, which have now stood over for a very long time.

(*n*) The Judges delivered their opinions the same day in that case, which, however, was not decided until the session of 1843.

Lord *Cottenham* this day moved the judgment of the House as follows :—My Lords, the opinions which have been delivered by the learned Judges have so far exhausted this case in all the most material parts of it, that I do not deem it necessary to enter at large into the very interesting and important matters which were discussed at the bar.

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The principal object of the suit was to have it declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the charity. The decree appealed from established the affirmative of that proposition, and of the seven Judges who attended the hearing at the bar of this House, six concurred in it. I cannot suppose that your Lordships will think that there is ground for differing from this opinion ; and if that should be your Lordships' feeling upon it, the result will necessarily be an affirmance of the decree. I cannot, however, omit to make some observations as to the *media* through which this conclusion has been arrived at by the different authorities by whom the subject has been considered.

Your Lordships will have observed that in the discussion in the Court of Chancery a very large range of evidence was admitted, with a view of coming to a decision as to what was the intention of Lady *Hewley*, which could, after all, only be judged of by the language and terms used in the deeds. In what respect and for what purposes this evidence was properly received was the subject of one of the questions put to the learned Judges, and has been the subject of some difference in their opinions. It does not appear to me necessary to consider minutely those

1842.
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differences, because I conceive that, keeping strictly within those rules which all the opinions recognise, there is sufficient, upon the view taken by the great majority of the Judges to support the conclusion to which they have come upon the main point in the case.

It was very clearly and shortly laid down by Mr. Baron Gurney, that that part of the evidence which goes to show the existence of a religious party, by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady *Hewley* was a member of that party, is admissible; that being in effect no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at that time.

Much evidence indeed appears to have been received, which, if of a nature to be received, might fall under the same rule, but which was objectionable upon other grounds, such as the opinions of living witnesses. But rejecting all such evidence, enough appears to me to remain unobjectionable in itself, and properly received for the above purpose, to support the conclusion to which a great majority of the learned Judges have come.

I have thought it right to make these observations upon this matter of evidence, as otherwise the affirmance of the decree might seem to sanction the receiving all the evidence received below, which might tend to introduce much doubt and confusion in other cases.

It may be thought that this opportunity should be taken of specifying what description of persons are hereafter to be considered as proper objects of the charity. I think that any attempt to do this would be dangerous, and would be more likely to promote than to prevent further litigation, as it is impossible

a priori to foresee the consequences of any such declaration, or to have sufficient information as to the various interests upon which it may operate, and which are not represented in this suit. What has passed in this cause, and the valuable opinions which the Judges have delivered, will, it may be hoped, afford such light to the trustees as to enable them satisfactorily to administer the funds for the future.

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It was made part of the complaint upon this appeal, that some of the trustees had been removed, as to whom it had not been proved that they entertained opinions inconsistent with the declared purposes of the trust. I do not consider the removal of any of the trustees as implying any reflection upon their moral conduct. But as by the decision of the Court it was found that the application of the funds for the time past had not been consistent with what appeared to the Court to be the real object of the charity, and as a larger discretion must necessarily be left to the trustees for the future, I think that, as a matter of discretion, it was right to select others for the future management of the funds; and if that was right in 1833, it certainly would be indiscreet to adopt a different course in 1842. I cannot therefore think that it will be right to alter this part of the decree.

I propose therefore to your Lordships to dismiss this appeal, and I see no ground for departing from the usual course of giving to the Respondents the costs.

Lord *Brougham*:—I agree with my noble and learned friend, that your Lordships ought to dismiss this appeal, and as usual, unless under very special circumstances, none of which exist in this case, with costs.

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 —
*Lady Hew-
 ley's Charities.*

This cause was originally heard before me in the Court of Chancery, all but the reply. I had the assistance of two learned Judges, though in consequence of my giving up the great seal before the case was fully argued, no opinion was given, and none indeed was formed by me in the absence of the reply. My noble and learned friend, who succeeded me in the Court of Chancery, heard the case through, according to my recollection, and gave the judgment which your Lordships are now moved by my noble and learned friend near me to affirm.

The opinions of the Judges undoubtedly have been of very great use to your Lordships in the examination of this somewhat difficult question, and I agree with my noble and learned friend that it is advisable for your Lordships to come to the decision to which the opinion of a great majority—six out of seven—of these learned persons would naturally lead. I am also of opinion, that it must be considered that in giving this affirmance to the decree, your Lordships do it under the qualification which has been stated by my noble and learned friend with respect to the reception of evidence.

Lord *Campbell* having argued the case as counsel at the bar, abstained from taking any part in the judgment.

[It was accordingly ordered that the appeal be dismissed, and the decree and order appealed from be affirmed; and that the Appellants pay to the Respondents their costs of the appeal.]

said trustees shall think fit," I should think that these words, accompanying and following the former, would be construed in conformity with them, and be intended to mean persons of the same persuasion, or professing the same religious principles with the more immediate objects of the trust; or at the least that such persons would be entitled to a preference before others in the administration of the funds. And lastly, as to the persons entitled to receive the bounty of Lady *Hewley's* deed of 1707, namely, persons placed in the almshouse founded by her, I think those persons are marked out more clearly and definitely to be such as at that time were members of some of the bodies of Protestant Dissenters from the Established Church before described; for the test which is prescribed by the rules of Lady *Hewley*, as to their admission, "that every almsbody must be able to repeat by heart the Lord's Prayer, the Creed, and Ten Commandments, and Mr. *Edward Bowles's* Catechism," and the direction that the inmates were duly to repair to "some religious assembly of the Protestant religion every Lord's-day, forenoon and afternoon," lead to the necessary conclusion, that, on the one hand, the foundation was not intended for persons of the Established Church, and, on the other, that it was confined to the members of the bodies of Dissenters which were known and acknowledged in fact as such bodies, and recognised and tolerated by law.

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In answer to the third question proposed by your Lordships, I beg to state my opinion to be, that in putting a construction upon the deed of 1704, the provisions of the deed of 1707 cannot be referred to. By the deed of 1704 the property contained in it is conveyed

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absolutely to trustees upon certain trusts therein contained; the deed of 1707 conveys property of Lady *Hewley* to the same persons, indeed, as are named in the deed of 1704, but other and different property, and upon other and different trusts. If the latter deed had recited or in any manner whatever referred to the deed of 1704, the two deeds might then have been considered as made *in pari materiâ*, or in effect as forming one deed; and the deed of 1707 might then have been directly and immediately appealed to, as explaining the intention of the foundress of the charity under the first deed. But the second deed is so far from containing any recital or reference to the first, that in the provision for applying the residue of the rents, the deed of 1707, instead of referring to the trusts of the deed of 1704, repeats them again in terms. I therefore conceive them to be perfectly independent deeds, and can see no legal principle of construction by which the provisions of the latter deed can be called in aid of the construction of the former, which is the only point to which your Lordships' third question adverts.

In answer to the fourth and fifth questions, namely, "Whether, upon the true construction of the two deeds, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of those deeds respectively?" the opinion at which I have arrived, founded upon that which appears to me to be the true principle of construction of those deeds, is, that ministers and preachers of what is commonly called Unitarian belief and doctrine, and their widows,

and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being the objects of the charities of both those deeds. First, taking the deed of 1704 by itself, I think the objects of it are limited to the ministers and others of the several bodies of Protestant Dissenters from the Established Church which were generally known, established, and tolerated at the time the deed took effect; and I am unable to find any proof, from any authentic source, that the Unitarians did form, in fact, at that time, a body or class of Protestant Dissenters, known and established in the kingdom. On the contrary, so far as can be inferred from the evidence produced or any other evidence of an historical nature, the Unitarians, as a body of persons of known religious tenets in *England*, were unknown until a period much later than the execution of either of the deeds in question; but further, so far were the persons who preached Unitarian doctrines from forming a religious body then known and acknowledged in the kingdom, that at the time of the execution of these very deeds, such persons could not avail themselves of the benefit of the Toleration Act, 1 *W. & M.*, c. 18, on the ground of their being persons who denied the doctrine of the Trinity, and under the statute 9 & 10 *W. 3*, c. 32, were at that time liable to certain penalties and disabilities, if by writing or teaching they denied the doctrine of the Trinity. When, therefore, in the deed of 1704, provision is made for the "godly preachers of *Christ's* holy Gospel," I think the answer to your Lordships' fourth question must be in the affirmative; first, because there were existing at the time certain bodies of Protestant Dissenters, well known and ascertained, who preached doctrines which

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had been generally understood and believed in all ages of the Church, and were also generally acknowledged at the time of the execution of the deed of 1704 to be the holy Gospel of *Christ*, of which bodies the Unitarians did not at that time constitute one; and as the deed was so framed that the trusts were to take immediate effect and operation, it must be held to apply to the preachers and others of such bodies only which did then actually exist, and at that time answer the description in the deed: And secondly, because the deed describes the persons who are to take to be the preachers of “the holy Gospel of *Christ*,” and it is undeniable that at the time of the execution of this deed, both the Church of *England* as by law established, and all the known classes or bodies into which Protestant Dissenters were divided, held the doctrine of the Trinity to be a fundamental part of their faith, that is, of the holy Gospel of *Christ*; and that at the time of the execution of that deed the Legislature also considered the belief in the doctrine of the Trinity as essential to the description of a preacher of *Christ's* holy Gospel, punishing those who preached doctrines which denied it.

If the persons who believe and preach Unitarian doctrines are excluded from the benefit of the deed of 1704, I think they are more clearly and unequivocally excluded by the deed of 1707; for by the rules and orders given by Lady *Hewley* for the regulation of the poor persons to be placed in the almshouse, which rules, being made by Lady *Hewley* under a power reserved by her in the deed itself and therein expressly referred to, may beyond doubt be called in aid in the interpretation of the meaning of that deed, it is directed that “every almsbody is required to be one who can repeat by heart the Lord's Prayer, the

Creed, and Ten Commandments, and Mr. *Edward Bowles's* Catechism :” which regulations appear to my mind to prove beyond any doubt that the foundress intended the inmates of the hospital and the other objects of her charity under that deed, to be persons who believed in the doctrine of the holy Trinity. And referring myself to the evidence given in this cause of the Unitarian belief and doctrine as to the divinity of *Christ*, I cannot understand that any person professing those doctrines could honestly or conscientiously repeat by heart, that is, express his belief in the doctrines contained in the Catechism of Mr. *Edward Bowles*. And if it had been necessary to determine the intentions of Lady *Hewley* as to the doctrinal belief of the inmates of her hospital without reference to the Catechism of *Bowles*, it must not be forgotten that upon the authority of two eminent persons, well known at the time in question, I mean Dr. *Barrow* and Mr. *Baxter*, the doctrine of the divinity of *Christ* was held to be sufficiently acknowledged as a matter of belief by those who received the Apostles’ Creed alone (*m*). And the weight of the observation for the present purpose consists, not so much in the consideration of the truth of the conclusion at which *Barrow* and *Baxter* have arrived, as in the proof it affords of the fact, that by all bodies of Christians by whom the Apostles’ Creed was received, that is, in *England*, by the members of the Established Church, and of all the Dissenting communities then known, the doctrine of the holy Trinity was also received and believed ; and it is by the current acknowledged use

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(*m*) *Barrow's* Treat. on the Creed, under the clause “ His only Son,” and *Baxter* in his Treat. “ Directions for Weak Christians,” part ii. section 53. 1.

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of language at that day that this deed is to be construed. In the latter deed, therefore, I think, *Lady Hewley* expresses her clear and undoubted intention that no Protestant Dissenter who denies the divinity of *Christ*, that is, no Unitarian, shall partake of her bounty.

My Lords, in answer to the last question proposed by your Lordships, I would state my opinion to be, that Unitarian preachers, and their widows, and other persons professing Unitarian doctrines, are capable, at the present day, of receiving the benefit of charities similar to those mentioned in the deeds of *Lady Hewley*, whenever they shall be properly described in any deeds of endowment; and that I see no distinction to be drawn between charities of one description or for one purpose and those for any other, for I consider, since the statute of 53 *Geo.* 3, c. 160, all distinction between Unitarians and other Protestant Dissenters as to this purpose is by law taken away.

The *Lord Chancellor*:—I move your Lordships, that the further consideration of this case be postponed, that your Lordships may have time to review the very elaborate arguments contained in the opinions of the learned Judges.

Lord *Brougham*:—I entirely agree with my noble and learned friend. The learned Judges, in the case of *Doe v. Perratt* (*n*), and of *Shore v. Wilson*, have presented to us most able and elaborate arguments, and afforded us the greatest assistance in forming our final judgment in these cases, which have now stood over for a very long time.

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Lord *Cottenham* this day moved the judgment of the House as follows:—My Lords, the opinions which have been delivered by the learned Judges have so far exhausted this case in all the most material parts of it, that I do not deem it necessary to enter at large into the very interesting and important matters which were discussed at the bar.

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The principal object of the suit was to have it declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the charity. The decree appealed from established the affirmative of that proposition, and of the seven Judges who attended the hearing at the bar of this House, six concurred in it. I cannot suppose that your Lordships will think that there is ground for differing from this opinion; and if that should be your Lordships' feeling upon it, the result will necessarily be an affirmance of the decree. I cannot, however, omit to make some observations as to the *media* through which this conclusion has been arrived at by the different authorities by whom the subject has been considered.

Your Lordships will have observed that in the discussion in the Court of Chancery a very large range of evidence was admitted, with a view of coming to a decision as to what was the intention of Lady *Hewley*, which could, after all, only be judged of by the language and terms used in the deeds. In what respect and for what purposes this evidence was properly received was the subject of one of the questions put to the learned Judges, and has been the subject of some difference in their opinions. It does not appear to me necessary to consider minutely those

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differences, because I conceive that, keeping strictly within those rules which all the opinions recognise, there is sufficient, upon the view taken by the great majority of the Judges to support the conclusion to which they have come upon the main point in the case.

It was very clearly and shortly laid down by Mr. Baron *Gurney*, that that part of the evidence which goes to show the existence of a religious party, by which the phraseology found in the deeds was used, and the manner in which it was used, and that *Lady Hewley* was a member of that party, is admissible; that being in effect no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at that time.

Much evidence indeed appears to have been received, which, if of a nature to be received, might fall under the same rule, but which was objectionable upon other grounds, such as the opinions of living witnesses. But rejecting all such evidence, enough appears to me to remain unobjectionable in itself, and properly received for the above purpose, to support the conclusion to which a great majority of the learned Judges have come.

I have thought it right to make these observations upon this matter of evidence, as otherwise the affirmance of the decree might seem to sanction the receiving all the evidence received below, which might tend to introduce much doubt and confusion in other cases.

It may be thought that this opportunity should be taken of specifying what description of persons are hereafter to be considered as proper objects of the charity. I think that any attempt to do this would be dangerous, and would be more likely to promote than to prevent further litigation, as it is impossible

a priori to foresee the consequences of any such declaration, or to have sufficient information as to the various interests upon which it may operate, and which are not represented in this suit. What has passed in this cause, and the valuable opinions which the Judges have delivered, will, it may be hoped, afford such light to the trustees as to enable them satisfactorily to administer the funds for the future.

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It was made part of the complaint upon this appeal, that some of the trustees had been removed, as to whom it had not been proved that they entertained opinions inconsistent with the declared purposes of the trust. I do not consider the removal of any of the trustees as implying any reflection upon their moral conduct. But as by the decision of the Court it was found that the application of the funds for the time past had not been consistent with what appeared to the Court to be the real object of the charity, and as a larger discretion must necessarily be left to the trustees for the future, I think that, as a matter of discretion, it was right to select others for the future management of the funds; and if that was right in 1833, it certainly would be indiscreet to adopt a different course in 1842. I cannot therefore think that it will be right to alter this part of the decree.

I propose therefore to your Lordships to dismiss this appeal, and I see no ground for departing from the usual course of giving to the Respondents the costs.

Lord *Brougham*:—I agree with my noble and learned friend, that your Lordships ought to dismiss this appeal, and as usual, unless under very special circumstances, none of which exist in this case, with costs.

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 ley's Charities.*

This cause was originally heard before me in the Court of Chancery, all but the reply. I had the assistance of two learned Judges, though in consequence of my giving up the great seal before the case was fully argued, no opinion was given, and none indeed was formed by me in the absence of the reply. My noble and learned friend, who succeeded me in the Court of Chancery, heard the case through, according to my recollection, and gave the judgment which your Lordships are now moved by my noble and learned friend near me to affirm.

The opinions of the Judges undoubtedly have been of very great use to your Lordships in the examination of this somewhat difficult question, and I agree with my noble and learned friend that it is advisable for your Lordships to come to the decision to which the opinion of a great majority—six out of seven—of these learned persons would naturally lead. I am also of opinion, that it must be considered that in giving this affirmance to the decree, your Lordships do it under the qualification which has been stated by my noble and learned friend with respect to the reception of evidence.

Lord *Campbell* having argued the case as counsel at the bar, abstained from taking any part in the judgment.

[It was accordingly ordered that the appeal be dismissed, and the decree and order appealed from be affirmed; and that the Appellants pay to the Respondents their costs of the appeal.]

SOPHIA PHIPPS, Widow -	-	-	<i>Appellant.</i>	1835: Aug. 18. 31,
GEORGE HOLLAND ACKERS -	-	-	<i>Respondent.</i>	1842: May 10. June 30. August 11.

A TESTATOR gave all his real and personal estates to trustees ; and as to his lands at *W.*, which he held in fee simple, he directed that the trustees should stand seised thereof, in trust to convey the same to *G. H. A.*, “when and as soon as he should attain his age of 21 years;” but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at *W.*, given and devised to him, should sink into the residue of the testator’s real and personal estates : and he gave the residue to *J. C.* At the testator’s death *G. H. A.* was only 12 years of age.—

Will.
Executory
Devise.
Vesting,

HELD, that an equitable estate in fee in the lands at *W.* vested in *G. H. A.* immediately on the testator’s death, liable to be divested in the event of his dying under 21 without leaving issue of his body.



JAMES ACKERS, by his will, dated the 13th of *April* 1822, gave and devised all his freehold, copyhold and leasehold messuages, lands and tenements, to trustees, upon certain trusts therein declared, except the lands, hereditaments and premises therein—after devised unto his godson, *George Holland Ackers*; as to which the will proceeded thus : “And as to, for and concerning all my messuages, lands and premises situate, lying and being at *Wheelock*, in the county of *Chester*, they my trustees shall stand seised and be possessed thereof in trust and to the intent and purpose to assign, convey and assure the same unto my godson, *George Holland Ackers*, eldest son of my nephew *George Ackers*, when and so soon as he, my said godson, shall attain his age of 21 years; and also do and shall pay unto my said godson, *G. H.*

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Ackers, the sum of 7,000 *l.* at and upon his attaining his said age of 21 years. But in case my said godson, *G. H. Ackers*, shall depart this life before he attains the said age of 21 years without leaving issue of his body, lawfully to be begotten, then and in such case the said messuages, lands and premises in *Wheelock* aforesaid, hereinbefore given and devised to him, together with the said sum of 7,000 *l.*, shall sink into and become part of the residue of my real and personal estate, and go according to the disposition thereof hereinafter expressed and contained." The residue of the real and personal estate was then by the will given to *James Coops*.

The testator died in 1824, leaving the said *G. H. Ackers*, who was then about 12 years of age, and attained his age of 21 years in 1833. In 1831 Mrs. *Phipps*, the testator's heiress at law, filed a bill in Chancery against the acting trustee and *G. H. Ackers* and others, stating the said will, and also, among other things, that the rents received by the trustee in respect of the *Wheelock* estate amounted to a considerable sum. The bill prayed, among other things, that it might be declared that the plaintiff was entitled to the rents and profits of the messuages and lands at *Wheelock*, from the death of the testator until such time as the infant defendant, *G. H. Ackers*, should attain 21 years of age.

To that bill *G. H. Ackers* demurred for want of equity, and the Vice-Chancellor allowed the demurrer (a).

The appeal against his Honor's order was argued in August 1835, but on Lord *Brougham's* recommendation, judgment was postponed (b).

The appeal came now to be re-argued by one

(a) 5 Sim. 44.

(b) Vol. III. ante, p 702.

counsel of a side, in presence of the Common-law Judges (c).

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Mr. *West*, for the Appellant, after recapitulating the proceedings that had taken place in the case, as mentioned in the Reports before referred to, and after reading the devise of the *Wheelock* estate as above set forth, said,—The sole question is, what estate did the Respondent take under that devise; was it vested, or contingent on his attaining the age of 21 years? If he took a vested interest on the death of the testator, then he was entitled to the rents and profits from that time till he attained his full age, when the estate was to be conveyed to him; but if the estate did not so vest, but was in contingency until he attained 21, the heiress at law, or her representative, after her death, was entitled to the intermediate rents and profits. The words “when and so soon as he shall attain his age of 21 years,” cannot be grammatically construed to vest a present interest. These words must be expunged before that construction can be put on this devise. The word “when” has been always held to create a condition precedent, except where an antecedent particular estate is given out of the property. The provisions of the will showed that it was not the testator’s intention to give any estate to the Respondent until he attained his age; the legal estate being devised to trustees, in trust, to convey it to him when he should attain that age, and there being no direct gift to him before that period.

[The learned counsel, in the course of his argument,

(c) Lord Chief Justice *Tindal*; Justices *Williams*, *Patteson*, *Coleridge*, *Erskine*, *Coltman*, and *Wightman*; Barons *Parke*, *Gurney*, *Rolfe*, and *Maule*.

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(which was much to the same effect as Mr. *Preston's* at the former hearing (*d*)) referred to and analysed the following among other cases, distinguishing such of them as were analogous with the present case from those which were not, viz. *Boraston's* case (*e*); *Grant's* case, cited in *Lampet's* case (*f*), and in *Cruise on Fines* (*g*); *Johnson v. Bellamy* (*h*); *Taylor v. Biddal* (*i*); *Edwards v. Hammond* (*k*); *Goodtitle v. Whitby* (*l*); *Bromfield v. Crowder* (*m*); *Fearne's Post. Works* (*n*); *Doe v. Lea* (*o*); *Stephens v. Stephens* (*p*); *Gibson v. Lord Montfort* (*q*); *Bullock v. Stones* (*r*); *Doe v. Nowell* (*s*); *Doe v. Moore* (*t*), (which he contended was a wrong decision, and not sustained by the cases therein referred to); *Hanson v. Graham* (*u*); *Stanley v. Stanley* (*x*); *Chambers v. Brailford* (*y*); *Leake v. Robinson* (*z*); *Duffield v. Elwes* (*a*); *Duffield v. Duffield* (*b*); *Genery v. Fitzgerald* (*c*); *Vawdry v. Geddes* (*dd*)].

Sir C. Wetherell, with whom was Mr. J. Russell, for the Respondent:—If *G. H. Ackers* should die under 21 and without issue, the *Wheelock* estate was to pass to the residuary devisee, *James Coops*; but if *G. H. Ackers* attained 21, the trustees were to convey the estate to him; or if he died under 21, leaving

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| (<i>d</i>) Vol. III. <i>ante</i> , p. 703 <i>et seq.</i> | (<i>r</i>) 2 Ves. sen. 521. |
| (<i>e</i>) 3 Rep. 19. | (<i>s</i>) 1 Maule & S. 327; 5 Dow, |
| (<i>f</i>) 10 Rep. 50 a. | 202. |
| (<i>g</i>) P. 183. (3d ed.) | (<i>t</i>) 14 East, 601. |
| (<i>h</i>) Cro. Eliz. 122; 2 Leon. 36. | (<i>u</i>) 6 Ves. 239. |
| (<i>i</i>) Ch Cas. 188. | (<i>x</i>) 16 Ves. 491. |
| (<i>k</i>) 3 Lev. 132; S. C. 1 New | (<i>y</i>) 18 Ves. 368. |
| Rep. 324, n. | (<i>z</i>) 2 Meriv. 363. |
| (<i>l</i>) 1 Burr. 228. | (<i>a</i>) 2 Sim. & Stu. 244. |
| (<i>m</i>) 1 New Rep. 313. | (<i>b</i>) 1 Dow & Clark, 268, 309; |
| (<i>n</i>) P. 191. | S. C. 3 Bli. N. S. 360. |
| (<i>o</i>) 3 T. Rep. 41. | (<i>c</i>) Jacob, 468. |
| (<i>p</i>) Cas. Temp. Talb. 229. | (<i>dd</i>) 1 Russ. & Myl. 203. |
| (<i>q</i>) 1 Ves. sen. 435; Amb. 93. | |

issue, the issue were to take it; and yet it is contended that this was not a vested estate. It is sufficient to look at the will, without the aid of cases, to see that this was a vested estate, because it is manifest that the ancestor must take in order that the issue might take, unless the solecism is to be supported that an heir can take as heir without an ancestor. All the cases cited, from *Boraston's*, downwards, have turned on the construction of the word "when," without the additional contingency in this case, of dying without issue; and even if that were wanting, we should nevertheless maintain, upon the authorities, that the estate in this case vested. With regard then to the argument on the other side, that the word "when" constitutes a condition precedent unless a previous estate for life or years is first carved out of the property, there were in *Boraston's* case expressions savouring strongly of such a condition, but the ground there taken in the decision was not that which is now advanced at the bar, but the abstract proposition that "when" and "then" did not import a condition precedent. Indeed, until the publication of Mr. *Fearne's* posthumous opinion, there was no instance of such a doctrine, and there is no trace of it in his work on Contingent Remainders, in which he would have taken the distinction implied in this posthumous opinion, if he ever really entertained it.

In *Edwards v. Hammond*, the record of which case was examined in *Bromfield v. Crowder*, the point was not raised, yet there no antecedent particular estate was given, the surrenderor taking back an estate for life, which was only the estate he had before; and the estate was nevertheless held to vest immediately. In *Bromfield v. Crowder*, where the word "if" was used, and in *Taylor v. Biddal*, the

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distinction might have been raised, if in any case, but it was not. In *Mansfield v. Dugard* (e) there was a devise to the testator's wife until his son should attain 21, and then to his son and his heirs; the son died under age, but it was held that the remainder vested in him at the testator's decease. In *Goodtitle v. Whitby* there was a charge for the maintenance of the infant during minority, but no prior estate was given, and Lord *Mansfield* put the supposition that the devisee might marry and leave issue before attaining 21. In *Doe v. Lea* there was no preceding estate, but the legal estate was vested in trustees, subject only to doing certain repairs upon the property. It was there argued that the estate depended on a condition precedent, but Lord *Kenyon* said that the question had been settled ever since *Boraston's* case. It is extraordinary that this distinction, if it ever existed, should have escaped Lord *Kenyon's* observation. *Doe v. Nowell* was understood by Lord *Ellenborough*, in *Doe v. Moore*, to be an authority for saying that this distinction was immaterial; and if it be not so, Lord *Ellenborough* must have made a double mistake; for he must not only have misconceived his authority, but must have decided erroneously according to that misconception. If this devise had stopped at the words "when and so soon as he shall attain 21," the estate would be vested. But supposing that part of the clause created a condition precedent, it would be controlled by the remaining part of the clause, under which this devisee dying under 21, leaving issue, would take.

It is said that until a conveyance is actually made, no estate or interest can vest. It is true, in nine

(e) 1 Eq. Cas. Ab. 195.

cases out of ten, the donee under a will must take through the medium of a conveyance. That ground of argument is matter of form and not of substance, and does not affect the intention of the donor. If it were to be held that the conveyance was the gift, and not that an equitable estate was given by the will, the gift would be made dependent upon a conveyance being made. There are words of gift here; the property is given to the trustees, and they are to convey the legal estate to the Respondent. In *Stanley v. Stanley*, the Master of the Rolls adverted to this distinction, and said it was not material that the estates were to be settled by a conveyance directed to be made; and in *Jervoise v. The Duke of Northumberland* (f), Lord *Eldon* says, "In my judgment, it makes no difference that the legal estate was not in him." The effect must be the same whether the estate is equitable or legal. If then a beneficial interest is given by the will, the conveyance is only the mode of carrying it into effect. The case of *Duffield v. Elwes* was in substance like the present case; if there should be a second son, he was to take the estate, and it was held to be vested; and *Bromfield v. Crowder*, in effect, decides it. *Hanson v. Graham*, *Chambers v. Brailsford*, *Leake v. Robinson*, and *Vawdry v. Geddes*, are all distinguishable from the present case.

[Lord *Campbell*:—What equitable estate do you say vested in *G. H. Ackers* upon the death of the testator; an estate tail or in fee?]

That question is not necessary to be determined now, the only question being as to the title to the intermediate rents, until the happening of the event subject to which a conveyance is directed to be made;

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(f) 1 Jac. & W. 570.

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but we should say that this devisee takes an estate in fee, liable to be divested if he dies, without issue, under 21.

Mr. *West* replied.

The *Lord Chancellor*, with the concurrence of the other Peers present, proposed the following question for the opinion of the Judges :—“*A. B.* being seised in fee simple of certain lands and hereditaments at *W.*, by his will duly executed and attested for passing real estates by devise, gave all his real estates at *W.* to his godson, *G. H. A.*, when and so soon as he should attain his age of 21 years ; but in case his said godson should die under the age of 21 years, then the testator directed that his said estate at *W.* should sink into and form part of his residuary real estate : and by his said will he gave all the residue of his real estates to *J. C.*, subject to various limitations and provisions affecting the same. The testator continued seised in fee simple of the said lands and hereditaments at *W.* until his death, and he died without revoking or altering his will, leaving his godson *G. H. A.* an infant of the age of 12 years. The opinion of the Judges is desired as to what estate *G. H. A.* took in the estate at *W.*”

The further consideration of the case was postponed to give the Judges time to consider the question.

June 30.

Lord Chief Justice *Tindal* this day delivered the opinion of the Judges, as follows :—In order to answer your Lordships’ question, it is not necessary for us to say what would be the legal effect of a simple devise to *A.* and his heirs when or if he shall attain 21, without any concomitant provisions calculated to show whether the testator did or did not mean to treat the attaining 21 as a condition precedent. In such a case

Mr. *Fearne* may be right in the opinion found among his posthumous works, that until the devisee attains the prescribed age, he takes no interest whatever in the devised lands. But whatever might be the true meaning of such a devise if it should occur by itself, there is ample authority for saying that such words may, from the context, be taken not to indicate the time when the estate is to vest, but to point out an event on the happening of which an estate already vested is to be divested in favour of some other person. And the cases on this subject appear to be resolvable into two classes: first, those in which the Courts have relied on the circumstance that the estate, prior to the attainment of the age of 21, has been given to some third person, either for the benefit of the devisee himself, as in *Goodtitle v. Whitby* (*g*), or for the benefit of some other persons to endure during the minority, as in *Boraston's Case* (*h*), and *Mansfield v. Dugard* (*i*); and, secondly, those cases in which the estates are given over in the event of the devisee dying under 21, as in *Edwards v. Hammond* (*k*), *Bromfield v. Crowder* (*l*), and *Doe dem. Hunt v. Moore* (*m*).

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The first class of cases proceeds on the ground that the estate given to the devisee on his attaining 21, is in fact only a remainder, taking effect in its natural order, on the determination of the preceding estates; and that the attaining the prescribed age in such a case no more imports a condition precedent than any other words indicating that a remainderman is not to take until after the determination of the particular estates.

The second class of cases goes on the principle that

(*g*) 1 Burr. 228.

(*h*) 3 Rep. 16.

(*i*) 1 Equ. Cases, 195.

(*k*) 3 Levinz, 132.

(*l*) 1 N. R. 313.

(*m*) 14 East, 601.

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the subsequent gift over in the event of the devisee dying under 21, sufficiently shows the meaning of the testator to have been that the first devisee should take whatever interest the party claiming under the devise over is not entitled to, which of course gives him the immediate interest, subject only to the chance of its being divested on a future contingency. Whether the doctrine on which this second class of cases has rested was originally altogether satisfactory, is a point which we need not discuss. It is sufficient to say that it clearly has been established and recognised as a settled rule of construction, not only in the Courts below but also in your Lordships' House, and that rule appears to us clearly to govern the case put to us by your Lordships: in conformity with which rule, therefore, we beg leave to state, that on the question put to us, we are of opinion that *G. H. A.*, on the decease of the testator, took an estate in fee simple in the lands and hereditaments at *W.*, subject to be divested in the event of his dying under 21 and without issue.

The *Lord Chancellor* having, on behalf of the House, thanked the learned Judges for their opinion, moved that the further consideration of the case be postponed; and it was postponed accordingly.

August 11.

The *Lord Chancellor*:—This case arises out of the will of *James Ackers*. The testator, by his will, devised his estates to trustees; and with respect to the *Wheelock* estate, the estate in question, he directed that the trustees should stand seised and possessed of it, in trust, to convey and assure it to *George Holland Ackers*, his godson, when and so soon as he should attain the age of 21 years, but that if he should

die under the age of 21 years without leaving issue of his body lawfully begotten, in that case the estate should form part of his residuary estates, which he devised to another person. The question is, under this devise, what estate *George Holland Ackers* took in the *Wheelock* estate?

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The question was argued in the presence of the learned Judges; but as this is an equitable estate, and as your Lordships are, no doubt, aware that it forms no part of the duty of the Judges to deliver opinions with respect to equitable estates, it became necessary to frame a question for their consideration in a different form, and accordingly the question put to the learned Judges was, in substance, this:—The testator being seised in fee of estates situated in the parish of *Wheelock*, devised those estates in this manner: he gave those estates to *George Holland Ackers*, when and so soon as he should attain the age of 21 years, but in case he should die under the age of 21 years without leaving issue, in that case the estates should form part of the residuary estate of the testator, which he gave over to another person: and the question put to the Judges was this, what estate *George Holland Ackers* took in the *Wheelock* estate?

The object which your Lordships had in view was, that the learned Judges should review the cases of *Doe dem. Hunt v. Moore* (n), and *Bromfield v. Crowder* (o), and other cases of that class. The Judges, after consideration, unanimously pronounce this, as their opinion, that *George Holland Ackers* took a vested estate in fee in the *Wheelock* estate, liable to be divested in the event of his dying under 21 without leaving lawful issue. I am, for one, perfectly satis-

(n) 14 East, 601.

(o) 1 New Rep. 313.

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fied with that decision of the learned Judges, and I have no doubt my noble and learned friends concur with me in that opinion; and the only question therefore that remains to be considered is this, whether a different construction should be put on this will, which conveys an equitable estate, from that which the learned Judges have put upon the will as applied to a legal estate; or in other words, whether the direction to convey makes any difference with respect to the disposition of the property? I am clearly of opinion that it does not; and I agree entirely in what fell from Sir *William Grant*, in the case of *Stanley v. Stanley* (*p*), that the right is not affected by the direction to convey, but that the conveyance must conform to the right, and that the will itself is an equitable conveyance, until that is displaced by the legal conveyance which is directed to be made. I am of opinion, therefore, that in this case *George Holland Ackers* took an equitable vested estate in fee in the *Wheelock* estate, and that it was divested on his dying under the age of 21 years without leaving lawful issue. The consequence of this is, that the judgment of the Vice-Chancellor must be affirmed.

Lord *Brougham*:—I entirely agree with the view which my noble and learned friend takes of this case, upon both the points; but it will be necessary for me to trouble your Lordships by going a little more particularly into it, in consequence of what passed when the case was heard before me, and out of which arose the discussion of it before the learned Judges.

After disposing of one of the two cases, reversing the decree of the Court below in 1835, I was at first

disposed to affirm the decree in the other; the case now before your Lordships (*q*). Upon looking more carefully into it, however, I came to the opinion that if the decree was to be supported, it could not be rested upon the same ground upon which I moved the reversal of the other decree, as the circumstances of the word "residue" and the words "other estates not disposed of," did not apply here; and the cases cited had no application, except the *Filecutter's* case, *Bullock v. Stones* (*r*), and Lord *Eldon's dicta* in *Genery v. Fitzgerald* (*s*). I therefore arrived at the conclusion, that if the decree below was allowed to stand, it could only be rested upon the interest given to *George Holland Ackers* being an immediate vested interest, and not contingent; that it was an interest vesting *instantly*, but liable to be divested on the event happening of *George Holland Ackers* dying under 21. I adverted to the doubts which had always been entertained in *Westminster Hall* upon *Doe v. Moore* (*t*), and the difficulty which I felt of reconciling it with other cases; and I stated my opinion that the case of *Bromfield v. Crowder* (*u*) does not go so far as *Doe v. Moore*, and is still more irreconcilable with the language used in deciding that case. Upon the whole, therefore, I recommended the postponement of the decision, and the having the case re-argued, with the assistance of the learned Judges. It has accordingly been re-argued, and your Lordships have the opinion before you of the Judges, who have arrived at the conclusion that the case of *Doe v. Moore* was rightly decided, though they give no opinion as to what they might have held, had the decision been

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(*q*) Vol. III. *ante*, p. 713.

(*r*) 2 Ves. 521.

(*s*) 1 Jac. 468.

(*t*) 14 East, 601.

(*u*) 1 N. R. 313.

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recent, and the question were now for the first time before them. Indeed, by expressly stating that they do not feel called on to inquire whether or not that case was satisfactorily decided, they seem to intimate a considerable doubt upon the point.

As I really had not expressed any opinion on this point, and only stated the doubt and difficulty which had seemed to hang over it, I am not prepared to recommend that your Lordships should differ from the learned Judges, and should declare the law to be erroneously laid down in a decision, which has for the last 30 years been unquestioned, and must in a great number of instances have been acted upon. My opinion is of little value; but I have now, after a more full examination of the question, arrived at the conclusion that, had the question been new and entire, I should have held the decision in *Doe v. Moore* to be erroneous, and that *John Moore* took a contingent, and not a vested, interest. That, I believe, was the opinion very general in the profession at the time.

There was one circumstance to distinguish this case from all those on which it was rested, viz., *Bromfield v. Crowder* (x), *Edwards v. Hammond* (y), and *Mansfield v. Dugard* (z). Those were cases of a remainder, and not of an immediate devise; and in *Goodtitle v. Whitby* (a) there was a trust to provide for the maintenance and education of infants, the devisees, during the minority. Then *Boraston's* case (b), which has been considered as the leading authority in these questions, was that of the estate being given to another during the minority, and the devisee was therefore held to take on attaining the age of 21, as

(x) 1 New Rep. 324.
 (y) 3 Lev.
 (z) 1 Eq. Cas. Ab. 195.

(a) 1 Burr. 228.
 (b) 3 Rep. 19.

if he merely took a remainder expectant on the determination of the estate first given as a particular estate. The like was the devise in *Goodtitle v. Whitby*. But it must be admitted, on the other hand, that in the present case the provision for the estate's sinking into the residue in the event of *George Holland Ackers* dying under age, would seem to show that it belonged not to the residue before this event; and this gives colour to the doctrine that the words relating to time only point out the time when an indefeasible estate is to vest. It must also be admitted that if the circumstances of *Doe v. Moore*, or of the present case, were in no respect distinguishable from those of *Bromfield v. Crowder*, and of *Edwards v. Hammond*, these cases are clear law and cannot now be doubted, and would decide *Doe v. Moore*. The former was, after much discussion, affirmed in this House; and in the course of the full consideration which it underwent in the Common Pleas, the Court had the record in *Edwards v. Hammond* examined, and found that the ejectment had been brought while the lessor of the plaintiff was under age (only 15), and that he prevailed, and consequently that the remainder was held to vest before the alleged contingency, and that the attaining 21 was not a condition precedent.

Bromfield v. Crowder was a devise to *A.* for life, remainder to *B.* for life, remainder to *C.* if he shall live to attain 21, but in case he die before, and *D.* survive him, then to *D.* if he attain 21, and not otherwise; and in case both boys die under 21, over to *E.* in fee. And it was held that *C.* took a vested interest in fee, determinable on his dying under 21. It was a case on all fours, as the Court said, with that of *Edwards v. Hammond*.

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We may now assume that whatever differences exist in these cases, and whatever might have been our opinion of them before the extreme application of them made in *Doe v. Moore*, the principle there sanctioned having been for so many years adopted by acquiescence, no course ought now to be taken which can break in upon it. It is of the most essential consequence that the doctrines which have been long received for law and acted upon by the Courts in their decisions, and by parties and their professional advisers in the disposition of property, should not be shaken. The Courts, and even this House, have frequently proceeded upon this principle, and have sanctioned what even plainly appeared to be erroneous principles, introduced and long assumed as law, rather than occasion the great inconvenience which must arise from correcting the common error, and recurring to more accurate views. Accordingly, when *Cadell v. Palmer* (c) was argued in this House, I advised that your Lordships should abide by the received extension which had for a great length of time been given to the period within which an executory devise might be held good, as not falling within the rule against perpetuities. In disposing of that case, however, my argument went expressly upon this view,—while I showed, I think, clearly, that the doctrine of 21 years and some months had originated in a manifest error originally arising from the period at which a recovery could be suffered to bar remainders. That argument I, however, perceive has not been reported.

We may then assume that if this devise had been to *George Holland Ackers* directly, the legal estate,

(c) Vol. I. *ante*, p. 372 ; S. C. 10 Bingham, 140, and 8 Bligh, 564.

the estate given, would have been vested and not contingent. The only question that remains is, whether the interposition of trustees, the trust being declared to assign, convey, and assure the premises (not to receive the rents and profits; that was *Stanley v. Stanley*, but only to convey) to *George Holland Ackers*, when and so soon as he shall attain 21 years, makes any difference, and converts the vested into a contingent interest.

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It was contended, that because the immediate interest is vested in the trustees, and that they are only directed to convey and to assign to *George Holland Ackers* when he is of age, the act done to entitle *George Holland Ackers* is postponed till that time, and his interest therefore only vests at that time. But there can be no doubt that the act which entitles him is the devise; from this he derives his interest though an equitable interest; and the only difference between his case and that of a devisee without trustees interposed or directed to convey, is that the legal estate remains in the trustees during his minority, and that the equitable estate vesting in him during that minority would be divested upon his decease under age. The inclination certainly should always be to make the rules of Courts of Equity conform as much as possible to the principles recognised at law; and I can see no reason whatever for dealing upon different principles with the vesting of an equitable and of a legal interest, in respect to the present question.

A doctrine at one time appears to have prevailed, which would sanction by analogy the difference here contended for, although the question arose on a power and not a trust. The second point in *Leonard Lovie's Case* (d) turned upon this, and the Chief Justice (who,

(d) 10 Rep 85.

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if it was in the Common Pleas, must have been Lord *Coke*; if it was in the King's Bench, I have endeavoured to ascertain who it was, and it must have been Lord Chief Justice *Fleming*; it was in the 11th of *James the First*—the Chief Justice held, that a power of appointment being in the first taker, with remainder over—in default of such appointment, the effect of the subsequent limitations was suspended, and the estates limited were contingent, instead of vesting subject to be divested by a subsequent execution of the power. Lord *Hardwicke* held a similar opinion in *Walpole v. Conway* (e), but apparently without due consideration; for in a fully considered case, *Cunningham v. Moody* (f), he determined otherwise; and Lord *Kenyon*, in *Doe v. Martin* (g), expresses his satisfaction that what he holds to be an erroneous doctrine in *Leonard Lovie's Case*, and in *Walpole v. Conway*, had been set right by Lord *Hardwicke*, on reconsidering the question more fully, and at a time of life when his judgment was more mature.

Later cases, however, come fully up to the present, and seem to leave no doubt upon the question. It seems enough to mention two; *Goodtitle v. Whitby* (h), and *Stanley v. Stanley*. The former of these was the case of a devise to trustees in trust for the testator's nephews, that is, on trust to lay out the rents and profits for maintenance and education of the nephews during their minority, and a devise to the nephews themselves in fee when and as they should respectively attain the age of 21. Now the provision for maintenance and education may be held to differ that case from the present, as regards the question of vested or contingent; but as regards the equitable

(e) 3 Barnardiston, 153.

(f) 1 Ves. sen. 174.

(g) 4 T. Rep. 39.

(h) 1 Burr. 228.

estate given, and the effect of that gift upon the question of vesting, the cases are substantially alike; for though there is no devise in trust to convey when the nephews attained 21, yet there is a trust during their minority; and this was not held to prevent the estate from vesting immediately. The Court held that the gift vested the estate in the nephews *instanter*, with a trust to be executed for their benefit during their minority.

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The present is a question of the estate vesting immediately, during a period when the trustees still held the legal estate, during the minority of *George Holland Ackers*, at the determination of which they are to convey to him. *Leonard Lovie's* case was relied on against the vesting. But Lord *Mansfield* cited a case, which he recollected in Chancery (*Tomkins v. Tomkins*, 17th G. 2), of a devise to *A.* in trust for *B.* until he should attain 21, and if he should die before, over, in which the age of *B.* was held only a limitation of the trust during his minority, and *B.* was decreed to take the whole by implication. This case was followed in *Doe v. Lea* (i), and ruled that case. But *Stanley v. Stanley* (k) seems on all fours with the case at bar, as regards the point now under consideration; at least I cannot in any way distinguish the two. There was an executory trust, the devise being to trustees to receive the rents and profits until *A.* came of age, and immediately after to convey to the use of *A.* for life, remainder to trustees to preserve contingent remainders, remainder to the first and other sons of *A.*; and for default of such issue, or if *A.* died under age, then in trust over. After the case had been argued, the Master of the Rolls (Sir *W.*

(i) 3 T. Rep. 41.

(k) 16 Ves. 491.

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Grant) suggested, that as the trustees to preserve contingent remainders only took on the determination of *A.*'s life estate, and as the trustees were not to convey to him until he attained 21, he could, while under age, have no life estate, on the determination of which the trust to preserve the contingent remainders attached. Chiefly on this suggestion of his Honor, a second argument was ordered. The estate was then considered in two lights, either as executed or executory. The Master of the Rolls held it clear that *A.* took a vested remainder for life, expectant on the determination of the estate, which the trustees took during his minority, holding that the trustees received the rents and profits for the heirs at law during the devisee's minority; and his Honor said, that on consideration there appeared to be nothing in the difficulty which had struck him at the former argument, because the right could not depend on the conveyance to be made, which must conform to the rights declared by the will.

Upon the whole I can see no reason to doubt that the estate, in the present case, vested immediately in *George Holland Ackers*, determinable upon his dying under the age specified, the trustees taking an interest for his behoof, limited to his minority.

I must add a few words, in consequence of something that has been said in the course of the argument upon the attendance of the learned Judges, as if they had been called in on an equitable question. They were not so called in; they were called in on the legal question, and not unnecessarily called in. If indeed it had been clear that, but for the equitable point, the remainder vested, their assistance would have been unnecessary; but it was impossible to know how that question should be decided, in the

conflict of authorities ; and had it been determined in favour of contingency, the equitable question never could have arisen. Their being called in was therefore essentially useful to aid the decision of the case.

Upon these grounds I entirely concur in the proposition which my noble and learned friend has submitted to your Lordships, that the decree of his Honor the Vice-Chancellor should be affirmed.

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Lord *Campbell*:—This case has been so elaborately discussed by my noble and learned friends who have preceded me, that it is quite enough for me to say that I entirely concur in the view they have taken of it. The question is with respect to the right to the rents and profits of the *Wheelock* estate between the death of the testator and the time when *George Holland Ackers* reached the age of 21 years. That depends upon whether he took a vested estate upon the death of the testator, liable to be divested upon his dying before 21 without issue. Now I must say that I entirely concur in the opinion of the learned Judges with respect to the legal question ; and when I look at the limitation over upon his dying before attaining 21 without issue, I think that it cannot admit of any reasonable doubt that if it had been a legal limitation it would have vested in *George Holland Ackers* immediately upon the death of the testator, liable to be divested on his dying before 21 without issue.

Then the question arises as to what effect is to be given to this being only an equitable estate, because it is a conveyance to trustees for the use of the trustees, their heirs and assigns, to convey in the manner stated. I think that equity in this case ought to follow the law ; and that case which has been referred

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to, of *Stanley v. Stanley*, seems to me to be a direct authority for that purpose. It was cited by the counsel for the Appellant with a different view, to show that the estate did not vest before 21; not with a view to show that if it had been a legal limitation the estate would have vested before 21, the circumstance of its being an equitable estate made any difference. There it was held that the rents and profits between the death of the testator and *Thomas Massey* reaching 21 did not go to him, but went to the heir at law. Therefore it was considered that the estate did not vest in him till he reached 21. That would only be applicable to the first point in the case; but there is a distinction which my noble and learned friends have referred to, that there the trustees were expressly required to receive the rents and profits until *Thomas Massey* reached the age of 21; therefore rebutting any presumption that *Thomas Massey* was to have any interest, legal or equitable, till he reached the age of 21 years. Therefore there is that distinction with respect to the first point. With respect to the second point, it appears to me to be an express authority to show that in this case *George Holland Ackers* took an equitable estate, on the death of the testator, liable to be divested on his dying before 21 without issue, and that consequently the rents and profits which accrued till he reached 21, he having survived, belonged to him, and that therefore the decree ought to be affirmed.

Lord *Brougham* :—I quite agree with my noble and learned friend that that case, upon the first point, is by no means irreconcilable with the present, because there was a devise of the rents and profits until *Thomas Massey* reached 21. It is a stronger authority upon the second point, inasmuch as the Master

of the Rolls at first leaned the other way, and changed his opinion upon further consideration.

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Mr. *Hooper*, agent for the Appellant, asked for the costs of the appeal out of the estate.

Lord *Brougham*:—I have some idea that there was an order below to pay the costs out of the estate.

The *Lord Chancellor*:—Up to the judgment there; but we do not depart from the usual course here, unless there is some very good reason.

Mr. *Hooper* requested their Lordships to look into what fell from Lord *Brougham* in the year 1835, when this case was before the House. (Vol. III. *ante*, p. 718.)

Lord *Brougham*:—You refer to what I said as to this being a very hard case: on the other hand, it is a very small estate.

Mr. *Hooper*:—It was suggested that, as this question arose out of the difficulty of construing the testator's will, all the costs should come out of the general fund, there being an estate of 8,000*l.* or 10,000*l.* a year.

Lord *Brougham*:—That applies to the judgment in the Court below, but this House never takes that into consideration.

The *Lord Chancellor*:—After a judgment has been given, if the party choose to carry the case further he must take the consequences. I think the judgment ought to be affirmed, with costs.

(The judgment of the Vice-Chancellor was affirmed accordingly, and the Appellant was ordered to pay the Respondent the costs of the appeal.)

- 1832 :
June 27. 30. **DOE, on Demise of ISAAC WINTER, *Plaintiff in Error.***
1833 :
June 25. **MATTHEW PERRATT & W. BURGE, *Defendants in Error.***
1839 :
July 2. ***E. C.* by his will, dated in 1786, gave his estate of *T.* to certain persons for life, and after their decease to his kinsman *J. C.*, or his male heir; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of his uncle *R. C.*'s family, yielding and paying to such of the daughters of the aforesaid *R. C.*, which should be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estates. The testator died in 1787; *R. C.* died six years before, having left five daughters only, all married; the eldest had several daughters but no son; each of the others had sons; all these persons were known to the testator.**
1842 :
May 10. ***J. C.* died in 1808 without having a son lawfully begotten.**
August 10. **The eldest daughter of *R. C.* died in 1799, having no son, but leaving a daughter who had a son, born in 1795, both still living.**
1843 :
Feb. 28. **The second died in November 1820, having had two sons, one born in 1763, who died in 1817; the second born in 1770, still living.**
The third died in 1813, leaving two sons, one born in 1771, who died in 1813; the other born in 1773, still living.
The fourth died in 1804, leaving a son born in 1768, who died in 1819, having devised to his wife in fee.
The fifth, still living, had a son born in 1772, who is still living.
The life estate in the devised lands expired in July 1820.—
HELD, 1st. That the remainder devised to the first male heir of the branch of *R. C.*'s family, was a contingent remainder in fee-simple.
2d. That such remainder, if once vested, could not become divested, so as to admit another in preference to him in whom it had vested.
3d. That said remainder did not vest in *R. C.*'s second daughter's son.
***Quære*, as between the titles of the grandson of *R. C.*'s eldest daughter, and the son of *R. C.*'s fourth daughter?**
Lord Brougham was of opinion (supported by five of the Judges),
1st. That the words "first male heir," were not used by the testator to denote a person of whom an ancestor might be living, but meant an heir of a deceased ancestor, in the technical sense.
2d. That the said remainder first vested in interest, in 1804, on the death of *R. C.*'s fourth daughter, and vested in her son.
Lord Cottenham (supported by six other Judges) was of opinion,
1st. That the words "first male heir," were used to denote a person of whom an ancestor might be living.
2d. That the said remainder did not first vest in interest in *R. C.*'s fourth daughter's son. (His Lordship did not say when or in whom it vested; two of these Judges said it vested in the first daughter's grandson, on that daughter's death in 1799; two others said it then vested in *R. C.*'s second daughter's son; and the remaining two said the will was in that respect void for uncertainty.)

EMANUEL CHILCOTT, being seised in fee of lands and tenements, called the *Truckwell* estate, made his will

the 16th of *March* 1786, and thereby gave and devised as follows: "I give unto *John Chilcott*, my kinsman, living in *London*, 100 *l.*, to be paid in one year after my decease." "Also I give unto *Ann White*, my sister-in-law, the sum of 20 *l.* and the income of *Burge's* cottage, and her living in it, if she thinks proper, during her natural life. Also I give unto *Elinor White* 100 *l.* and half of *Truckwell* estate, during her natural life. Also I give unto *W. Burge*, my servant-man, 5 *l.* All the rest and residue of my goods, chattels, rights, credits, personal and testamentary estate, and also my lands, tenements, and hereditaments, I give, devise, and bequeath unto *Elizabeth Chilcott*, my dearly beloved wife, during her natural life, whom I make my whole and sole executrix; and I do allow her the said *Elizabeth Chilcott* to give what she thinks proper of her said effects to her sisters, *Elinor White* and *Ann White*, during their natural lives; and after the above lives being expired, that is to say, *Elizabeth Chilcott*, *Elinor White*, and *Ann White*, all the lands, rights, profits, and hereditaments of *Truckwell* estate to come to *John Chilcott*, my kinsman, living in *London*, or his male heir, if any; free land not to be sold or mortgaged on any account whatsoever, but to remain in the *Chilcotts'* family for land of inheritance, with two cottages, garden, and orchard in the parish of *Brompton Ralph*, adjoining to the aforesaid *Truckwell* estate, called by the name of *Middle Wetcombe*, free land: And if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, who lived at *Hancrich Farm*, yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100 *l.* each, at the time of the taking possession of the aforesaid estates."

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The testator died in *May* 1787, seised of the said lands and tenements, without revoking or altering his said will, and without issue, leaving the said *Elizabeth Chilcott*, his widow, and *Ann White* and *Elinor White*, him surviving. *Ann White* died in the year 1791. *Elizabeth Chilcott*, by her will dated in *April* 1792, in pursuance of the power given her in her husband's will as aforesaid, devised the lands and tenements therein comprised, over which she had power of disposition, unto her surviving sister *Elinor White* for her life, and died in *Dec.* 1795. *Elinor White* thereupon became seised, under both wills, of the entirety of the said lands and tenements for her life, and died so seised in *July* 1820. *John Chilcott*, described in *Emanuel Chilcott's* will as "living in *London*," was his next cousin and heir at law: he died in 1808, without ever having any heir male by him begotten, leaving an only daughter, *Sarah Chilcott*, who in 1789 married one *Thomas Webb*, and died in 1810, leaving issue an only son, *John Chilcott Webb*, who thereupon became the heir at law of *John Chilcott* and also of the testator *Emanuel Chilcott*. By an indenture dated *August* 1814, *John Chilcott Webb* demised the *Truckwell* estate to one *William Grey* for 1,000 years, declaring that a fine levied thereof by him and his wife should enure to the said *W. Grey*, his executors, &c. during the said term, and subject thereto, to the use of *J. C. Webb* and his heirs. *J. C. Webb* died intestate in *April* 1820, leaving *John Staines Webb* his only child and heir at law, who is now the heir at law of the testator *Emanuel Chilcott*.

Richard Chilcott, the uncle of the testator, in his will mentioned as having lived at *Hancrich Farm*, died in 1780 without ever having had a son, but having had five daughters, whom he left surviving:

namely, *Mary*, born in 1739 ; *Joan*, in 1741 ; *Sarah*, in 1744 ; *Betty*, in 1746 ; and *Agnes*, in 1749.

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Mary, the eldest, married *George Bishop*, and died in 1799, leaving issue four daughters only ; of whom the eldest, *Betty Bishop*, born in 1769, married *John Derham Perratt*, by whom she had issue a son, *Matthew Perratt*, the Defendant in Error, born in 1795. His mother is still living.

Joan, the second, married *Isaac Winter*, and died in *November* 1820, having had issue two sons, of whom the elder, *Thomas Chilcott Winter*, born in 1763, died in 1817, a bachelor and intestate, leaving his only brother, the Plaintiff in Error, born in 1770, his heir at law.

Sarah, the third, married *Samuel Parsons*, and died in 1813, leaving issue two sons, of whom the elder, *James Parsons*, born in 1771, died in 1813 without issue and intestate ; and *John Parsons*, the second son, born in 1773, is still living.

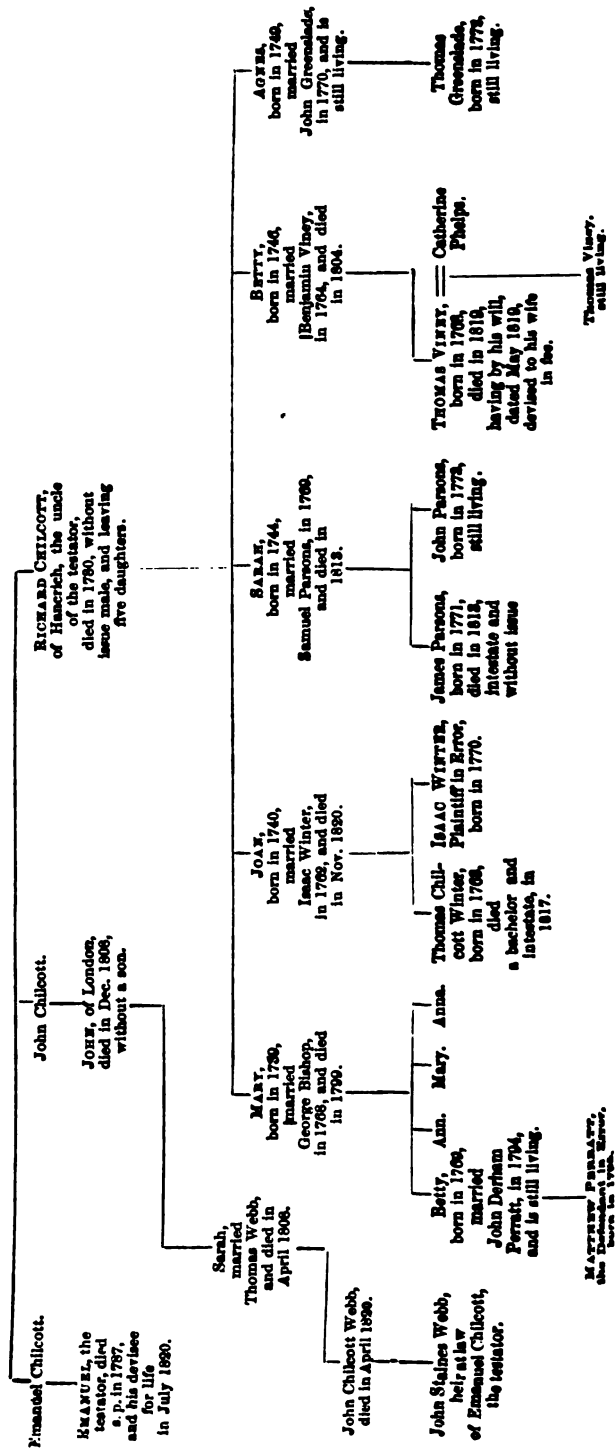
Betty, the fourth, married *Benjamin Viney*, and died in 1804, leaving issue an only son, *Thomas Viney*, born in 1768, who died in 1819, leaving issue one son, *Thomas Viney* (who is still living), and having by his will devised all his real estate to his wife, *Catherine Viney*, in fee.

Agnes, the fifth daughter of the said *Richard Chilcott*, married *John Greenslade*, by whom she had issue a son, *Thomas Greenslade*, born in 1772, and who is still living, as is also his mother.

The said five daughters of *Richard Chilcott* were living at the time *Emanuel Chilcott* made his will and at the time of his death ; and as well they as their said several and respective descendants, who were born before the date of the said will, were all well known to the testator at the time of making his will.

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PEDIGREE OF THE CHILCOTT FAMILY.



In the year 1821, soon after the death of *Elinor White*, the tenant for life of the lands and tenements called the *Truckwell* estate, three actions of ejectment were brought by several parties claiming to be entitled to that estate under *Emanuel Chilcott's* will. In the first, *Isaac Winter* claimed as being heir at law of his brother, *T. C. Winter*, who, it was alleged, was, at the death of *John Chilcott* without any male heir lawfully begotten by him, "the first male heir of the branch of *Richard Chilcott's* family," according to the intention of the testator. *Matthew Perratt*, the defendant to that action, claimed the estate as better answering the description than the plaintiff.

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The second ejectment was brought on the several demises of *Mrs. Viney*, widow and devisee of *Thomas Viney*, and of *Thomas Viney*, their son, and of *Thomas Greenslade*, the son of *Richard Chilcott's* fifth daughter. The third ejectment was on the several demises of *John Slade* (who, as the personal representative of *William Grey*, claimed under the said indenture, executed by *John Chilcott Webb* in August 1814), and of *John Staines Webb*, heir at law of the said *J. C. Webb* and of the testator: *Matthew Perratt* was the defendant to these actions also.

A special verdict was found in each of the actions, stating the devise above set forth, and further, in substance and effect, as hereinbefore stated.

The special verdicts were argued in the Court of King's Bench in 1822 and 1824; and in 1826 the judgment of the Court was delivered for the defendant in the first and third actions, and for *Mrs. Viney* in the second, in accordance with the opinions of Mr. Justice *Littledale* and Mr. Justice *Holroyd*, *dissentiente* Mr. Justice *Bayley* (a).

(a) See the Report, 5 Barn. & C. 48.

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Isaac Winter brought a writ of error in this House on the judgment in the first action. The case was argued on the 27th and 30th of *June* 1832 (*b*), in the presence of the learned Judges, for whose opinions the following questions were proposed by the House:

“1st. Is the remainder ‘to the first male heir of the branch of the family of the testator’s uncle, *Richard Chilcott*,’ a remainder in fee simple or fee tail?”

“2d. Was the expression ‘first male heir’ used by the testator to denote a person of whom an ancestor might be living?”

“3d. At what time did this remainder vest in interest?”

“4th. In what person did this remainder first vest in interest?”

“5th. Could the remainder, if once vested in interest in any person, open or become divested so as to admit another person in preference to the person in whom it had so vested?”

The further consideration of the case was then adjourned to give the Judges time to consider their answers to those questions.

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THE learned Judges again attended on the 25th of *June* 1833; and in consequence of differences of opinion between them, those who were present proceeded, by direction of the House, to deliver their answers to the questions, *seriatim*, with their reasons.

Mr. Justice
Taunton.

Mr. Justice *Taunton*:—Before I proceed to answer *seriatim* the questions propounded by your Lordships to the Judges, I must observe that if the words “male

(*b*) The arguments on that occasion are omitted, as they were to the same effect as those that were urged at the rehearing, which are reported, *infra*, p. 641 *et seq.*

heir," in the limitation "to the first male heir of the branch of my uncle *Richard Chilcott's* family," be construed in its strict technical sense, the limitation must fail altogether; for there never has, in that sense, been such a male heir. In a will, the words "heir male of *A.*," mean heir male of the body of *A.*; *Lord Ossulston's Case* (c); and though that simple form of expression be not used in this will of *Emanuel Chilcott*, yet I take it the words "male heir of the branch of my uncle *Richard Chilcott's* family," in effect are the same as "male heir of the body of my uncle *Richard Chilcott.*" This *R. Chilcott* at his death left five daughters, and had no son; and although four of them married and had sons, yet as the known rule of law is, that under such a limitation the title must be derived entirely through males(d), it is obvious that no male heir of the body of *R. Chilcott* has ever come into *esse* or ever can. If, therefore, the law will permit some person, other than a male heir properly so called, to be substituted, the limitation may take effect, and the Courts of Law are bound to find out what person under the circumstances is best entitled; or otherwise the will as to this part is void. In any way of considering this case, it is impossible to say that there are not serious difficulties, and no opinion can be given without considerable doubts. But effect, if possible, must be given to the will rather than it should fail; and in order to do this, I think the words "first male heir" must be construed to mean first male descendant. *Richard*, the uncle, died in the lifetime, and six years before the death, of the testator, and the testator knew that he had left only daughters, and that *Joan*, one of them, who married *Isaac Winter*, had two sons. It is not to be presumed

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(c) 3 Salk. 336.

(d) Litt. ss. 24, 25 b.

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that he meant nothing by this devise to the branch of his uncle *Richard's* family. He must then have intended by the terms "first male heir," some other person than one strictly coming within this appellation.

I have premised these general observations because it appears to me they furnish a key to many of the questions proposed.

In answer to the first, my humble opinion is, that the remainder is a remainder in fee simple, and not in tail. The term here, "first male heir," is a word of purchase, and a mere designation of the person who was to take. It is in the singular number, and excludes plurality; *Periman v. Pierce* (e). In this respect it resembles the limitation in *Archer's Case* (f), of "next heir male of A.;" in *Clerke v. Day* (g), of "daughter's heir;" in *Walker v. Snowe* (h), of "right heir male of Sir E. to be begotten after the sixth son." In effect it is the same as if the devise had been to one by name; but being without words of limitation, which accompanied the several devises in the cases above mentioned, the remainder could have been only for life, if it had ended there. But the charge created by the words "yielding and paying unto such of the daughters of the aforesaid *Richard Chilcott*, which shall be then living, the sum of 100 *l.* each," enlarges the interest to a fee.

It has been argued at your Lordships' bar, that where there is a gift to a special heir as heir male, it must give an estate tail, for such a gift defines the line of descent in which the estate is to go: And this in some cases, where the word "heir" is used in the strict sense of heir, undoubtedly is so. Thus, in

(e) Palm. 303.
 (f) 1 Rep. 66.

(g) Moore, 593.
 (h) Palm. 359.

Mandeville's Case (i), where *John de Mandeville*, by his wife, *Roberge*, had issue *Robert* and *Maude*, *Michael de Morevile* gave certain lands to *Roberge*, and to the heirs of *J. Mandeville*, her late husband, on her body begotten, and it was adjudged that *Roberge* had an estate but for life, and the fee tail vested in *Robert* (heirs of the body of his father being a good name of purchase), and that then when he died without issue, *Maude*, the daughter, was tenant in tail as heir of the body of her father *per formam doni*. "In which case it is to be observed," says Lord *Coke*, "that albeit *Robert* being heir took an estate tail by purchase, and the daughter was no heir of his body at the time of the gift, yet she recovered the land *per formam doni*, by the name of heir of the body of her father, which notwithstanding her brother was, and he was capable at the time of the gift; and therefore, when the gift was made, she took nothing, but in expectancy, when she became heir *per formam doni*." So in the case of a gift to a man and the heirs of the body of his ancestor, the donee, by reason he is named, will take an estate for his own life; and under the limitation to the heirs of the body, an estate in tail will execute in the person who can bring himself within that description. If the donee himself answer the description of heir of the body of the ancestor, it will for that reason execute in himself; if another person be the heir of the body of the ancestor, then in that other person. Thus, where *A.*, having two sons, *B.* and *C.*, covenanted to stand seised to the use of *B.* and the heirs male of his body on *M.* his wife to be begotten, and for want of such issue to the heirs male of his (*A.*'s) own body; and for want of such issue to

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(i) Co. Litt. 26 b.

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his own right heirs for ever; *B.*, the eldest son died, leaving issue one son and several daughters; *A.* died, and the son of *B.* died without issue: the Court held the limitation to the heirs male of the body of *A.* to be words of purchase, and to vest in the son of *B.* upon the death of *A.*, as heir male of his body by purchase; and that on the death of *B.*'s son, it descended to his uncle *C.*, as heir male of the body of *A.* *per formam doni*; *Southcote v. Stowell* (*k*). But in these instances the estate tail arises out of proper words of limitation in the plural number, denoting a certain continuous line of posterity; *heirs of the body*. But no such effect can be given to the words, *heir*, *heir of the body*, *right heir*, or *next*, or *first heir*, where they constitute only a mere *designatio personæ*.

This distinction between the remainder being in fee or in tail is very material in this instance, because if it were in tail, it is clear the words of charge would not enlarge the interest to a fee, and the consequence would be, that if *Thomas Viney* was a mere tenant in tail, his devise to his widow *Catherine* would be inoperative, though if the several sons of the daughters could be considered as very heirs male of the body of *Richard* the uncle, under a limitation to such heirs male, *Isaac*, the brother of *Thomas Chilcott Winter*, would, although a collateral, succeed to him as coming under that denomination. That none of the male issue of the four daughters took an estate tail is, I think, perfectly clear, and I have noticed this point so much at length in deference only to the authority of the gentlemen who suggested it at the bar.

With respect to the second question, I think the expression first male heir was used by the testator to

(*k*) 1 Mod. 226. 237; 2 Mod. 207.

denote a person of whom an ancestor might be living. The general rule is well known, *nemo est hæres viventis*; that is, the law recognises no one as heir until the death of his ancestor. A party may be heir apparent or heir presumptive, but he is not very heir, living the ancestor; and therefore where an estate is limited to one as a purchaser under the denomination of *heir*, *heir of the body*, *heir male*, or the like, according to this rule the party cannot take as a purchaser unless, by the death of his ancestor he has, at the time when the estate is to vest, become very heir. But this rule has been relaxed in many instances, and an exception engrafted on it, that if there be sufficient (which Lord *Hobart*, in *Counden v. Clarke* (*l*), defines to be "declaration plain") on the will to show that the word *heir* is used in such a way as to show the testator meant heir apparent, it shall be so construed. In such a case the popular sense shall prevail against the technical. The principal cases which establish this are, *Burchett v. Durdant* (*m*), (reported in some books under the names of *James v. Richardson*;) *Darbison d. Long v. Beaumont* (*n*); *Goodright v. White* (*o*). These cases have been so fully commented on in the judgments of the learned Judges in the Court below, and by the counsel at your Lordships' bar, that it is unnecessary for me to detail the facts. It is sufficient for me to observe, that, in my opinion, the circumstances in the case now under discussion afford a declaration as plain as any one of these. These circumstances are, the testator's knowledge of the state of his uncle *Richard's* family; that his uncle was dead; that he left no heir male, but only daughters; the bequest of legacies to such of the daughters

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(*l*) Hob. 33.

(*m*) 1 Vent. 334; 2 Vent. 311.

(*n*) 1 P. Wms. 229.

(*o*) 2 W. Blk. 1010.

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as should be living at the time the remainder vested, to be paid by the person who was to take under the description of "first male heir;" and the terms of the devise itself, which are "first male heir," not of the daughters, or of any one daughter specifically, but "of the branch of my uncle *Richard Chilcott's* family." Out of these facts these considerations arise; that the testator clearly meant that the devisee should take, not with reference to his character as heir male, but as male descendant of some one of *Richard Chilcott's* daughters, whether they should be living or dead; for though it is true he contemplated the possibility of some dying before the vesting of the remainder, yet, if all were living, according to the will, all were to receive legacies, and to be paid by the very devisee himself; the heir, that is, of a living ancestor. Again, if this be deemed impossible, and no son of a living daughter were capable of taking, the consequence would be, that if all the daughters of *Richard*, the uncle, had been living at the determination of the particular estate, or if all had died without issue save one, and that one had a son, in either case the remainder must have failed, and the legacies would have been lost; although, in the first supposition, all the legatees would have been living, and in the other the son would have been the only possible male heir that could have come into existence. The testator, therefore, contemplated the possibility of the remainder vesting during the lives of the daughters.

Under these circumstances I am satisfied that there is enough to show that the testator used the word *heir*, not in its strictly legal, but in its popular acceptance. I have already observed, that if the word be here used in its former sense, the will in

this part must be inoperative, because, supposing *Thomas Viney* to be preferable as born before *John Parsons*, and being from the death of his mother her very heir, when the particular estate determined, so that the maxim of *nemo est hæres viventis* could not be applicable, yet still he would not be heir male of the branch of the uncle *Richard*'s family; for all the five daughters of *Richard* as coparceners made altogether only one heir, and the living sisters of his mother, or the issues of such as were dead, would, according to the common law, be parceners with him in a course of descent from *Richard*. But the testator by the words "first male heir" intended that the remainder should vest in one only; and this furnishes another proof that the strict definition of the term "next male heir," is not consistent with the intention of the testator.

In answer to the third question, I have to say that, in my opinion, the remainder vested in interest on the death of *Mary*, the eldest daughter of *Richard* the uncle. This depends, in some degree, upon the answer to the fourth question. The testator, I think, anticipated *some* future event, whereby the vesting of the remainder should be governed. He has said, that if at the expiration of the estates for life, there should be no heir male lawfully begotten of *John Chilcott*, then the lands should fall to such person as at that time should be first male heir of the branch of his uncle *Richard*'s family. The remainder, therefore, was necessarily contingent, and waited until it could be seen who should turn out to be "first male heir;" and as soon as the possibility ceased of a better male heir coming into the world, the remainder vested in interest in the person who, at the moment of that possibility ceasing, was the first, or, in my construc-

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tion, the best and most worthy heir male. This event happened on the death of *Mary Bishop*. Until then she might, in contemplation of law, have borne a son, whose birth would have superseded the titles of the issue of the other sisters respectively. But afterwards no better "first male heir" could be born than then existed in some one instance of the daughters' issue. In any way of putting the case, one of these persons, *Matthew Perratt*, or *Thomas Chilcott Winter*, or *Thomas Viney*, must have been entitled.

With respect to the fourth question, which is the most perplexing, I am of opinion that the remainder first vested in *Matthew Perratt*, the son of *Elizabeth*, the eldest daughter of *Mary*, who was the eldest daughter of *Richard* the uncle; and this upon the ground that he is the representative of the eldest branch of the uncle's family. I think "first male heir" meant not first in order of birth, but first in dignity and worthiness of blood. In order of birth *T. C. Winter* was the first male branch of *Richard's* family, and although the testator knew of his and his brother's existence, he passed them by. If he had meant that the remainder should vest absolutely in either of them, there was no reason why he should not have named them, with proper limitations to the issue of the other daughters to meet the possible event of their death. But if the first-born male was not as such intended by the testator, there is no ground for supposing that he could have contemplated with certainty any subsequent born male in a lower degree of worthiness. It is to be recollected that not one of these descendants completely answers the description of the person in the will. But Lord *Hale* says, in *Pibus v. Mitford* (p), that when the construction

(p) 1 Vent. 381.

cannot be to the very letter of the condition, it shall be in another manner, but as near the intent as may be. In *Co. Litt.* (q) this case is put:—If land be devised to one for life, the remainder to the next heir male of *B.* in tail, and *B.* hath issue two daughters, and each of them hath issue a son, and the father and daughters die, some say this remainder is void for uncertainty; some say the eldest shall take it, because he is worthiest; and others say that both of them shall take, for that they both make but one heir. This shows the preference given by the opinion of some to the issue of the eldest daughter in that case. In *Periman v. Pierce* (r), the case was, *Harpur* having three daughters, demised his land to his two youngest for life, the remainder *proximo consanguinitatis et sanguinis* of the devisor; and died. The youngest, having issue, died; the issue continued the possession. The eldest daughter entered, claiming as *proxima de sanguine* of the devisor; whereupon he brings trespass: and the question was, whether the remainder was to the elder daughter alone, or to all the daughters together. There *Montague, J.*, thought the eldest daughter alone should have it, for though all the daughters are equal in proximity, as all are the children of the devisor, yet the intention of the testator is expressed in the singular number, and so it appeared that by the will only one should be the elder, which one is the eldest sister. In *Hale's MSS.*, cited in *Hargrave's Co. Litt.* 10 b., n. 2, the case is somewhat differently stated: Thus; *Harpur* having a son and four daughters, viz. *A.*, *B.*, *C.*, and *D.*, devises to the son in tail, remainder to *B.* and *C.* for life, remainder *proximo consanguinitatis et sanguinis* of the devisor; and, *Easter, 17 Jac.*, by two Justices

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(q) 25 b.

(r) Palm. 11. 303; Co. Litt. 10 b. n. 2.

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against one, the remainder vests in all the daughters when the son dies without issue. But afterwards, *Michaelmas*, 20 Jac., *per totam Curiam*, it vests in the eldest daughter only, and not in all the daughters; first, because *proximo*; second, because an express estate is limited to two of the daughters: *Periman v. Pierce*. If the limitation here had been to the "first heir," and not to the "first male heir," and the question had been between the five daughters, this authority appears to determine it in favour of the eldest; and if, as between the daughters, *Mary* would be entitled to preference, *Matthew Perratt*, as her representative, is equally so. But against this it may be said that *M. Perratt* is one degree further removed from *Richard Chilcott* than *T. Chilcott Winter*, whose brother and heir, *Isaac Winter*, the lessor of the plaintiff, is, and therefore that *I. Winter's* title is the better one; and for this may be cited a passage in *Co. Litt.* 10 b., where Lord Coke, having illustrated the difference between right of representation and right of propinquity in the law of descent, and given the preference to the right of representation, though the party be more distant, says, "but here ariseth a diversity in law between next of blood inheritable by descent, and next of blood capable by purchase; and therefore in the case before mentioned, if a lease for life were made to *A.*, the remainder to his next of blood in fee, in this case it hath been said *D.* shall take the remainder because he is next of blood, and capable by purchase, though he be not legally next to take as heir by descent." The like is laid down in *Bro. tit. Done and Remainder*, 20. But to this I answer, that the remainder here is not to the next of blood of *Richard* the uncle, but to the "first male heir," which leaves the question open in what sense heir male is to be first? I think, first in the character

of heir, that is, by right of representation, in worthiness and dignity of blood, and not in nearness of kindred. And this will be expounding the will according to the before-mentioned rule of Lord *Hale*, in *Pibus v. Mitford*.

In answer to the fifth question, I am of opinion that the remainder, if once vested in interest in any person, could not open or become divested, so as to admit another person in preference to the person in whom it had so vested. There are instances in which a remainder may open and let in newly accruing interests: as where a contingent remainder is limited to the use of several, who do not all become capable at the same time, notwithstanding it vests in the person first becoming capable, yet it shall divest as to the proportions of persons afterwards becoming capable, after the determination of the particular estates (*s*). Under the circumstances of this case it is not necessary to pursue this doctrine at length. Here, the remainder was contingent until the death of *Mary Bishop*, and it then I think vested in *Matthew Perratt* as a purchaser; and the general rule is, that where a remainder once vests in one as a purchaser, it shall not afterwards divest on the birth of a nearer heir; *Bro. tit. Done & Rem.*, pl. 21; but shall run in a course of common descent; *Southcote v. Stowell* (*t*). Here then if it had once vested in any other person as the first heir male, it would not have opened or have been divested to let in *Matthew Perratt*.

Mr. Justice *Bosanquet*:—The answers to be given to the several questions proposed by your Lordships depend so much upon each other, that I must request permission first to examine the various points which

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(*t*) 1 Mod. 226.

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they appear to me to involve ; and having so done, to offer my humble opinion upon each question proposed, as the result of such examination. In attempting to put a construction upon a will so singular as that which I am now required to expound, I could not venture with confidence to pronounce a very decided opinion, even if I were ignorant that opinions different from my own had already been judicially declared. In obedience however to your Lordships' commands, I have endeavoured to ascertain the legal effect of the testator's disposition ; and having formed an opinion in favour of the claim of *Matthew Perratt*, the grandson of the eldest daughter of *Richard Chilcott*, I do not think myself at liberty to say that the terms of the instrument are too ambiguous to admit of reliance being placed upon my interpretation of it, though it is by no means impossible that when your Lordships shall have heard the different opinions which prevail among the Judges, your Lordships may be induced to consider all the constructions suggested by them as too uncertain to exclude the claim of the heir at law.

The first point to be considered is, what estate in remainder has the testator given by the devise to the first male heir of the branch of his uncle *Richard Chilcott's* family ? The words "male heir," as here used, designate some particular person who is to take in remainder after the termination of another estate. Such words may be used as descriptive of an individual as well as any other term, if apparently used with that intent ; and as there are no words which give or imply a preceding freehold, they must operate as words of purchase. They are followed by no words of limitation : they do not of themselves import a description of a class of persons, but are in the singular number, and in terms confined to an indi-

vidual person. Standing alone, therefore, they would not carry any estate of inheritance. A devise to the heirs of the body of *J. S.*, indeed, will carry an estate tail *per formam doni*, under which the devisee would take in the same manner as if the estate had descended to him from *J. S.* Yet supposing the words "male heir of *J. S.*" in a will to have the same effect as "heirs of the body of *J. S.*," still, if it shall appear, as I think it must for the reasons hereafter given, that the devisee could not represent *R. Chilcott* or his daughters in such a way as to have taken the estate by descent if first given to *R. C.* or his daughters, the devisee cannot take an estate tail. Considering the words, then, as descriptive of an individual, and *primâ facie* carrying only an estate for life, yet being followed by words of charge upon the person of the individual to whom the estate is limited, he will take a fee notwithstanding the absence of words of limitation.

The next point to be considered is, what description of person did the testator designate by the words which have been used? According to a general and long-established rule of law, a person does not take by purchase, even under a will, by the words "heir male," unless he be also very heir as well as male. He may take as heir male by purchase, though he claim through a female, which he could not do by descent; but according to the above general rule, he must be heir general as well as male. This rule, however, like other general rules respecting the interpretation of wills, is not so inflexible that it may not be relaxed if the testator's intention to the contrary appear by demonstration plain. It may be admitted that words of art are to be construed according to their technical sense, unless upon the whole

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will it is plain that the testator did not so intend, and that the words "heir male" are words of art. But the whole will, and every word contained in it, as well as its application to the object of it at the time when it was made, are to be taken into consideration. Does it then plainly appear that the testator did not mean to use the words "heir male" in the strict sense which the law *primâ facie* ascribes to them? *R. Chilcott* was dead, having left five daughters, who were his coheirs; and their respective heirs collectively would be the heir of the stock of *R. Chilcott*. Of these five daughters the four youngest had sons, and the eldest had none, but daughters only. It is clear the testator intended the whole inheritance to go to one person, for the devise is to the first male heir, "male heir" in the singular number, and "the first." But no son or other male descendant of any of *R. Chilcott's* daughters could be complete male heir either of *R. Chilcott* or his family, except upon the failure of male descendants of all his daughters but one. It is scarcely possible, therefore, to suppose that the testator could intend that no one of *R. Chilcott's* family should take anything except in such an extraordinary event as that of the entire heirship having centred in a single male. A son or grandson of one of the daughters might be heir male of his own mother or grandmother, but he would not be complete heir of any of the other daughters who left children, whether male or female. Further, it appears from the use of the word "first," that the testator intended priority of some kind. But among coheirs there is no priority by law. In this respect, therefore, some peculiar meaning must also be ascribed to the word "heir," as employed in this will. Further still, no person can be heir in the strict legal

sense whose ancestor is living; *nemo est hæres viventis*; and it is contended that the testator's description must be confined to a male who should have survived his mother. Now it is found in this case that the testator well knew the state of the family at the time when he devised the remainder by the words "first heir male." *John Chilcott* then had no son; and if he should not have any (as he had not), this remainder was to come into possession upon the deaths of the testator's wife and her two sisters, an event which might reasonably be expected to happen at no great distance of time after the testator's own death. The testator not only knew that the five daughters of *Richard Chilcott* were living, but he speaks of them in his will, and directs legacies to be paid to such of them as should be living when the remainder should fall into possession; from which the expectation of the testator plainly appears, that the estate of the person described as male heir would probably come into possession during the lives of at least some of the daughters. Is it a rational intention to impute to the maker of this will (as such intention is to be collected from the terms of it), that if all the daughters should survive the time for taking possession, the whole estate should pass from all the males of *R. Chilcott's* branch of the family, and that all the daughters should lose their legacies? Yet such must be the effect of construing the word "heir" strictly according to the maxim *nemo est hæres viventis*.

Lord *Hardwicke* (u), upon the rehearing a decree of Lord *Cowper*, who had held a younger brother to be capable of taking as heir male under a devise to the heir male of the body of the testator's great

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grandfather, though the daughter of an elder brother was heir general, divided the case into two questions: first, whether it was an established rule that he who claims as heir male by purchase must be general heir as well as nearest male descendant; and secondly, whether the apparent intent of a testator to the contrary may not create an exception to the general rule. He then says, with respect to the rule itself, that if the doctrine had been *res integra*, he was so fully convinced of the unreasonableness of it that he never would have established it. But when a rule of law has long prevailed, it ought to be supported though it be not strictly agreeable to natural reason; for in many instances it is more material that the law should be settled than how it is settled. He then proceeds to consider the second question; and after stating several authorities to show there might be exceptions to the general rule, he pointed out the particular circumstances which he relied upon in the case before him; and on account of those only, affirmed Lord *Cowper's* decree. We have therefore the authority of Lord *Hardwicke*, while assenting to the rule, admitting that it is not indispensable that the devisee should in all cases be complete heir in every sense of the word, and acting upon that admission. It has been already shown that the manifest objects of the present will must be defeated, unless a coheir can be considered as heir. If then the testator has not employed the word heir in its full and absolute, and strictly legal sense, to what extent is the construction to be enlarged?

Notwithstanding the strictness with which the rule has generally prevailed, and the apparent application to it of the maxim *nemo est hæres viventis*, it has been determined by the very high authority of your Lord-

ships' House, in more instances than one, that the word heir may be construed to mean heir apparent, if the context of the will so require. Thus, in a case which arose upon the will of one *Wilks*, a devise in remainder "to the heirs male of the body of *Robert Durdant* now living," was determined in this House, in a case of *James v. Richardson* (x), in conformity with a judgment of the King's Bench, which had been reversed in the Exchequer Chamber, to be a remainder vested in the heir apparent of *Robert Durdant*. And in another case which afterwards arose upon the same will, *Burchett v. Durdant* (y), the Courts of King's Bench and Exchequer Chamber held themselves bound by the previous decision of the House. Again, in *Darbison v. Beaumont* (z), a case arose upon another will containing a devise in remainder "to the heirs male of the body of *Elizabeth Long*, wife of *R. Long*, lawfully begotten." A legacy was given to *Elizabeth Long*, and her three sons were named in the will; by which it appeared that the testator knew that she was living, and then had three sons. The Court of Exchequer, by a majority of the Judges, held that the eldest son, during the life of his mother, might sustain his claim to the remainder, being heir apparent; and though their judgment was reversed by the two Chief Justices in the Exchequer Chamber, it was affirmed in this House.

These decisions of the highest tribunal must be esteemed binding and conclusive upon the Judges of *Westminster Hall*, in any case which cannot in prin-

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(x) Sir T. Jones, 99; 1 Vent. 334; 1 Eq. Cas. Abr. 214; Sir T. Raym. 330. (y) 2 Vent. 311; 3 Keb. 831; Pollexf. 457.

(z) 1 P. Wms. 229; Fortesc. 18; 2 Equity Cases Abr. 533, pl. 3.

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ciple be distinguished from them. It must indeed be admitted that several very learned persons have hesitated to acquiesce in the doctrine which they established; yet we find the doctrine recognised by Lord Chief Baron *Gilbert*, in his *Treatise on Uses and Trusts*, p. 25, who there says, "If an estate for life be devised to *A.* during the life of *B.* in trust for *B.*, and after the decease of *B.* to the heirs male of the body of him the said *B.* "now living," that is a remainder vested in the heirs of *B.*; for "heir now living," in a devise, must be taken as a periphrasis of the heir apparent, who is called heir in law, as may be observed by the words *quare filium et hæredem rapuit*." The language of the Statute of Treason (25 *Edw.* 3) might also have been added as an instance, in which the heir apparent to the Crown is called the King's and Queen's eldest son and heir. And in a case of *Goodright dem. Brooking v. White(a)*, which was a devise to the heirs of the testator's daughter *M. W.*, to whom he had given a term and an annuity, and made her sole executrix and residuary legatee, the Court of Common Pleas sustained the claim of the son of *M. W.* during his mother's life; *De Grey*, C. J., saying that the testator took notice that his daughter was living by leaving her a term and a subsequent annuity, and meant that a present interest should vest in her heir, that is, her heir apparent, during her life. I cannot suggest any distinction between these cases and the present, which militates against the adoption of a similar construction in favour of any male descendant of the daughters of *R. Chilcott*, who can establish his claim to be considered as heir apparent. The knowledge of the

(a) 2 W. Blacks. 1010.

testator that all the daughters, and the sons of four of them, who were heirs apparent to their respective mothers, were living at the date of the will, and the direction that the devisee should pay legacies to the daughters, as already noticed, when the remainder should fall into possession, are circumstances at least as strong as those contained in any of the above cases, and exclude the supposition that all benefit both to the devisee and the legatees was to fall to the ground, unless the devisee's own mother happened to be dead.

If the word "heir" can be construed to mean heir apparent, the next consideration will be, in what sense is the word "first" to be understood? Does it import priority of birth, priority of degree, or priority of line? As it appears that four of *R. Chilcott's* daughters had sons born in the lifetime of the testator, all well known to him, it is very improbable that if he meant priority of birth, he should not have named the person who then stood first according to that priority. But when it is observed that the four younger daughters had sons already born, and the eldest had no son, the probability is very strong that, in making use of the general expression "first heir male," he intended to embrace the line of the eldest daughter, for the purpose of giving her descendants priority in case she should have issue male.

In the transmission of real estates by descent, the law has adopted no distinction between several daughters on account of priority of birth, nor between their respective descendants on account of comparative proximity to the common ancestor, nor between the lines of the several daughters on account of priority to each other: yet it is clear, that of all the descendants of *R. Chilcott*, one person only was

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to take the remainder, and that the testator meant priority of some kind. It is said in *Co. Litt.* 25 b., if lands be devised to one for life, the remainder to the next heir male of *B.* in tail, and *B.* hath issue two daughters, and each of them hath issue a son, and the father and daughters die, some say the remainder is void for uncertainty; some say the eldest shall take, because he is the worthiest; and others say that both of them shall take, for that both make but one heir. Lord *Coke* expresses no opinion of his own, but if the last be that to which he is inclined, as is usually implied, his opinion would be against any distinction in favour of the son of the eldest daughter, upon a mere devise to the next male heir. But in *Hale's MSS.*, cited in the notes to *Co. Litt.* 10 b., by Mr. *Hargrave*, is the following: "*Harpur*," &c.—[The learned Judge read the note as before read by Mr. Justice *Taunton*, *supra*, p. 621-2.]—This case cannot indeed be considered as a distinct authority, that under a mere devise to the next heir male, the son of the eldest daughter would take to the exclusion of the others; for although the Judges expressed an opinion in favour of the eldest daughter, yet according to the reports of the case in *Palmer*, 11 & 303, intitled of the 17 & 20 *Jac.*, the question having been twice brought in judgment, the Judges did not agree in the reasons for their opinions; some of them considering the eldest daughter entitled to preference by the terms of the devise; and others relying upon an express estate being given to the two younger sisters, which excluded them, by implication, from taking the estate under the devise in question. But it is an authority to this extent, that a devise to the next in blood will be confined to the eldest of several daughters, if it can be implied from the will

that a preference of the eldest was in view. We must therefore look to the will itself, and endeavour to ascertain whether any preference is to be collected from it, regard being had both to the terms of the will and the situation of the family. The terms of the will are very peculiar. The testator was the son of the eldest of three brothers, *Emanuel, John, and Richard Chilcott*. *John Chilcott*, mentioned in the will, was the son of the testator's eldest uncle, and by his decease had become the representative of the next branch of the family to that of the testator's. To him, or to his heir male, if any, the testator gave the lands in question after the deaths of his wife and her sister. And if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of his uncle *Richard Chilcott's* family. This *R. Chilcott* was the testator's second uncle, and his five daughters then living had, by his death, become the representatives of his branch of the family.

The testator appears to have wished to give his whole estate to a male of a family, of which all the stocks then existing were females. Had the stocks been males, the estate would have gone according to the priority of lives. What is then the fair import of the devise which he has made? Is it not a devise to the heir male who shall be found to stand first in *R. Chilcott's* branch of the family pedigree? A pedigree is commonly called the family tree, and a branch of it is that portion of the pedigree which arises from any particular member of it. The words, indeed, are not exactly arranged in the devise as I have supposed. They are, "first male heir of the branch of my uncle *R. Chilcott's* family." Such a collocation of the words, if strictly taken, give no meaning whatever to

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the word "branch," distinct from the word "family;" for even supposing the word "family" to be construed daughters, or descendants, or issue, the expression "the branch of *R. Chilcott's* daughters, or descendants, or issue," would be without meaning. I think, therefore, that the words must necessarily be read, "first male heir of my uncle *R. Chilcott's* branch of the family." If so read, the word "family" will import the whole family or pedigree of the *Chilcotts*, and *R. Chilcott's* branch of the family that portion of the pedigree which issues from *R. Chilcott*; and the first male heir of that branch will, by a very natural construction, import the first male heir (or heir apparent), according to the priority of the lives in that pedigree. Such appears to me to be a much more natural construction than that of heir apparent first born, and more consistent with the apparent views of the person who was pursuing the branches of his family according to their order, and who, finding females only as the representatives of the third branch, was seeking the means of establishing a male representative, or *hæres factus*, of it. This view of the subject is much strengthened by adverting to the situation of the family when the testator made his will. The four younger daughters of *R. Chilcott* had sons already born; and the son of the eldest of them was born before any of the others. If the testator intended the first heir apparent that should be born to take, the object was before his eyes, and he had only to name him, as he named *John Chilcott*, the son of his deceased uncle *John*; but instead of naming any of the heirs apparent of the four youngest daughters, he thought fit to employ an expression calculated to embrace an heir apparent of the eldest daughter, who had then no son or other male descen-

dant; and by words of the singular number, "first male heir," to confirm his disposition to one person. All these circumstances lead me to the conclusion that the testator intended priority of line rather than priority of birth. If then priority of line was intended rather than priority of birth, is this sort of priority to be continued throughout the first line, or is proximity of degree to prevail over priority of line? In the transmission of real property by heirship, all the descendants of the first line, however remote, are preferred to the nearest members of the second. If, therefore, *Mary Bishop* and *Joan Winter* had been male instead of female stocks, there is no doubt that the grandson of the former would be esteemed heir of *R. Chilcott's* branch of the family, in preference to the latter; and in a devise to the heir male of *R. Chilcott*, the grandson of his eldest son taking by purchase, though claiming through a daughter, would be esteemed heir male, being both heir and male, in preference to the son of the second son.

To me it appears, that although the testator has passed over the daughters of *R. Chilcott* in the devise of the estate, the descendants of those daughters are intended to be treated in the same manner as if the places occupied by the daughters in the pedigree had been occupied by males. It may here be observed, that although the law considers all the daughters as standing in *æquali jure* in respect of inheritance, yet, that in certain cases where selection is required, a preference is given to the eldest coparcener, and such privilege will descend if it does not arise from her own act. Thus, if there be divers coparceners of an advowson, and they cannot agree to present, the law doth give the first presentment to the eldest; and this privilege shall descend to her issue, nay, her

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assignee shall have it. So, if parceners agree that partition shall be made by friends, the law gives the first claim to the eldest; but this privilege descendeth not to the issue, but the next eldest shall have it; for there is a diversity to be observed between this case of a partition or deed by the act of the parties, for then the privilege of election shall not descend to her issue; and when the law doth give any privilege without her act, then that privilege shall descend; *Co. Litt.* 166 b. If, therefore, an advowson devised to *R. Chilcott* had descended to his five daughters, and the church had become void, the eldest daughter, in the absence of agreement, would have been entitled to present to the first turn, and if she was dead, her descendants, in preference to the second daughter.

This brings me to consider whether *Matthew Perratt*, the grandson of *Mary Bishop*, the eldest daughter, at the time when the particular estates determined, viz. in 1820, answered the description contained in the will, according to the principles of construction I have endeavoured to establish. *Mary Bishop*, his grandmother, died in 1799, leaving *Elizabeth*, her eldest daughter, married in 1794 to *John Derham Perratt*, and three other daughters. *Elizabeth*, in 1795, bore a son, *Matthew Perratt*, who, as well as his mother, *Elizabeth Perratt*, and her three sisters, are still living. *Elizabeth Perratt* therefore, and her three sisters, became in 1799 coheirs of their mother, *Mary Bishop*, the eldest daughter of *R. Chilcott*; and *Matthew Perratt* then became heir apparent of his mother, the eldest of those coheirs. Now if the disposition of this will, when applied to the state of the family at the time when it was made, necessarily shows that the person designated as the first male heir was not intended to be complete and

entire heir, but might sufficiently answer the description of heir of one of the several coheirs of *R. Chilcott*, I cannot see any distinction in principle between a person who is heir to one coheir who represents a fifth, and one who represents a portion only of a fifth. In the present case *Winter* is heir apparent to the daughter of the second line, who represents one-fifth of the stock of *R. Chilcott*; and *Matthew Perratt* is heir apparent to the granddaughter of the first line, who represents one-fourth of one-fifth of *R. Chilcott's* stock. But *Matthew Perratt*, as heir apparent, and a male of the first line, stands first, according to my view of the subject, in *R. Chilcott's* branch of the family pedigree, and is consequently the person answering the description pointed out by the testator. This character was perfectly in him when his grandmother died in 1799. From 1795, when he was born, till 1799 he was only heir presumptive, because his grandmother, in contemplation of law, might have had a son, but in 1799 his character of heir apparent was complete; and then, I think, but not till then, the remainder first vested in interest. Till that time, it appears to me that the remainder was contingent. No person before that time could be said to fill the entire character of first male heir, in the sense which I have ascribed to it. So long as the first line remained without a male heir apparent, the title of every other male of the family to the character of first male heir was dependent on contingency; and as the person described was to take in fee, the remainder could not vest in any one during the uncertainty as to the person to whom the devise could apply; *Fearne*, Cont. Rem., c. 1, s. 8.

These considerations induce me to answer the

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several questions proposed by your Lordships, as follows, viz. :—

1st. That the remainder to the first male heir of the branch of the family of the testator's uncle, *Richard Chilcott*, is a remainder in fee.

2dly. That the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living.

3dly. That this remainder vested in interest in 1799, when *Mary Bishop* died.

4thly. That this remainder first vested in interest in *Matthew Perratt*.

5thly. That the remainder, if once vested, could not open or become divested, so as to admit another person in preference to the person in whom it had vested.

Mr. Justice
Littledale.

Mr. Justice *Littledale* adhered to the opinion which he had delivered in the Court of Queen's Bench (b). His answers to the questions were :—

1st. That the remainder was a remainder in fee simple.

2d. That the expression "first male heir" did not denote a person of whom an ancestor might be living, but meant the heir of a deceased ancestor.

3d. That the remainder vested in interest in 1804, on the death of *Betty Viney*.

4th. That it then vested in interest in her son *Thomas Viney*.

5th. That the remainder so vested could not become divested, so as to admit any other person in preference to him in whom it had vested.

(b) 5 Barn. & Cress. 56.

Mr. Baron *Bayley* also continued of the same opinion as when the case was before him in the Court below (c); his answers now to all the questions, except the fourth, were the same as those given by Mr. Justice *Taunton* and Mr. Justice *Bosanquet*; but in answer to the fourth, he said it was his opinion that the remainder first vested (on the death of *Mary Bishop*, in 1799) in *Thomas Chilcott Winter*, and upon his death passed by descent to his brother; and for that opinion he gave his reasons, as follows:—"The competition lies, as it seems to me, between him and *Matthew Perratt*; and my preference of *Winter* is, because he is *propinquior gradu*, and because *Perratt*, in point of representation, stands in the place of his *mother* only, a female, and therefore less worthy than *Winter*. I do not say that the son of a daughter may not, under circumstances, claim as heir male of his grandfather, or the daughter of a son as heir female. I do not say that *Perratt* is not heir male of his grandfather, or that he might not be one of the co-heirs of his great-grandfather, *Richard Chilcott*; but I think he is not *first male heir* within the meaning of this devise. This is a very peculiar case: the eldest daughter's line is resorted to, not because the children in that line are more the male heirs of *R. Chilcott* than the sons of any of the other daughters, but because *inter pares* the eldest daughter's is the proper line, and it prevents confusion to refer to it. But when there is a disparity in the claimants under the different lines, and the person who claims in the eldest daughter's line is more remote, and therefore less worthy than the person who claims in the second daughter's line, I see no satisfactory reason for adher-

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(c) 5 Barn. & Cress. 84.

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ing to the elder daughter's line. I think I do see a satisfactory reason for departing from it. One of the grounds upon which our law adopts in *infinitum* lineal descendants in preference to collaterals, is, that the descendant represents the ancestor, that is, stands in the same place as the ancestor, if living, would have done. This is *Blackstone's* first rule or course of descent; and what is the fair meaning of this rule, as applied to this case? Is it to raise *Perratt* into his mother's place, and allow him to reckon as a grandson of *R. Chilcott*? Or is it not rather, if he is to be raised into his mother's place, to identify him with his mother, and upon the principle of representation to treat him as a female rather than a male? To treat him as a male, it seems to me he is to be considered as a great-grandson; and then I should say he has not so good a claim to the character of "first male heir" as a grandson of the eldest daughter. Let it be remembered also, that *Mary*, the eldest daughter, had four daughters; so that if a son of one of them would have answered the description of "first male heir," the remainder never could have vested till the particular estate ended, unless the eldest had a son, and unless that son survived his grandmother. And though this would be no argument if it were *clear* who is to be considered as coming under the description of "first male heir," it may have some weight when this is *not clear*, and when we are deciding upon the rule by which this is to be ascertained. If, for instance, the three younger daughters of *Mary* had married and had had sons, and the elder had continued single till *Elizabeth White* died, this remainder would have continued contingent till the death of *E. White*, because the elder daughter might still have married and have had a son; and any son

by her born (or in *ventre sa mere*) and before *E. White* died, would, if that be the right construction, have been the first male heir of *R. Chilcott's* branch.

“These considerations lead me to the conclusion that *Thomas Chilcott Winter* is the person who answered the description of first male heir, not *Matthew Perratt*; and that from *Thomas Chilcott Winter* the right descended upon his brother *Isaac*.”

Lord Chief Justice *Tindal* gave the same answers to the first and fifth questions as the preceding Judges had given. His answers to the other questions were more fully given upon the second argument; *infra*.

The further consideration of the case was then adjourned.

THE House, in pursuance of a petition presented by *I. Winter*, the Plaintiff in Error, in 1839, ordered the case to be re-argued by one counsel of a side, and it was accordingly re-argued in presence of the Judges, on the 2d of *July* in that year.

The *Attorney-general*, for the Plaintiff in Error:—The Plaintiff in Error is entitled to recover by the strength of his own title; he is the only person who answers the description in the will. *Viney*, the son of the fourth daughter, had two Judges in his favour in the Court below, but that was upon the supposition that the words “first male heir” in the will did not mean heir apparent, and that no one could take a vested interest as heir during the life of his parents. But when the case was first discussed in this House, all the Judges except Mr. Justice *Littledale* thought that “heir” might mean heir

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apparent, and that the party might take under that description by purchase. The argument now on the part of the Plaintiff in Error, is that the words first male heir mean the first male descendant, and therefore such male descendant is as much the heir, living his mother, as if she was dead. The title of the heir at law need not be discussed now, for almost all the Judges were opposed to his claim; and there is the more reason for this, since the establishment of his claim would deprive the five daughters of the 100*l.* distinctly given to each of them by the testator. If then he is rejected, there are three persons between whom to choose.

The word heir, in this will, does not mean *totus hæres*. *Richard Chilcott* had five daughters; the testator could not mean that the heir of all should take. The word heir, therefore, cannot in this case have its strictly technical meaning. The person who is to take is an unnamed person. He must be a person to take by purchase under this description. *Thomas Chilcott Winter* is the person that best answers the description in the devise. He is the first male heir of *Richard Chilcott*, being the son of his second daughter, and being born in 1763, the eldest daughter not having had any son. In point of descent, therefore, he stands nearer to *R. Chilcott* than does *M. Perratt*, and he came into existence at an earlier period than *Viney*. He was, in fact, the first male issuing from *R. Chilcott* who came into existence, and he was in existence at the time the testator made his will. One question put to the Judges was, whether when the estate had once vested, it could become divested? They unanimously answered, that it could not. If so, then it is clear that the title to it vested in *Thomas Chilcott Winter* at his birth; and

the remainder actually vested in him on the death of the testator, and continued in him during his life. Remainders must vest as soon as possible, and Courts must put such a construction on a will as will presently give a vested estate; for the law will not allow an estate to remain in mere contingency if it can be vested; *Burchett v. Durdant* (*d*). It must vest in some one. It must vest in the first person who, at the death of the testator, was entitled to take it. It could not afterwards be divested by the birth of *Perratt*. It is true that in some respects *Perratt* might be considered as worthier to inherit, being the eldest daughter's descendant; but the decisive answer to his claim is, that he was not alive when the estate first vested, and having once vested in another, could not be divested in order to vest again in him.

A person described as heir in a will, may be so, and may take by purchase, under that description, in the life of the ancestor. In a case like the present, the law will not allow the vesting of the estate to wait till there shall be a son of the body of the eldest daughter. If it would, the vesting of the estate might be indefinitely postponed, a mischief against which the law ever desires to guard; *Glenorchy v. Bosville* (*e*). Then it is said that the testator here knew *Thomas Chilcott Winter*, and if he had meant that person to take would not have left in the will the indefinite description of "first male heir." But the eldest daughter of *R. Chilcott* was still alive, and the testator, perhaps, believed in the possibility of her having a son; at all events, the fact that he did not specifically name *T. C. Winter*, is no proof that he meant to

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(*d*) Carth. 154; S. C. T. Jones, 99; 1 Vent. 334; 2 Vent. 311; and, nom. *James v. Richardson*, 2 Lev. 232; Sir T. Raym. 330.

(*e*) Cas. Temp. Talb. 18.

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exclude him. The reasons in favour of *Winter's* claim are strong; but what is there in the claim of *Perratt*, the grandson of the eldest daughter, or of *Viney*, the son of the fourth daughter of *R. Chilcott*, to support the title of either of them to this estate? Two of the Judges thought that *Perratt* was entitled to take, but they did not give proper weight to the consideration that the estate might vest immediately on the death of the testator. It might do so; if it might, it did; and if it did, nothing that afterwards occurred could divest it. It is clear that the law requires such a construction to be put on a will as will make the remainder vest during the continuance of the estate for life; *Goodright d. Brooking v. White* (f). This vesting of the remainder cannot be put off indefinitely; for then the particular estate which was to sustain the contingent remainder, might be at an end before that remainder vested. And further, this postponement of the vesting of the remainder cannot be allowed, because of the legacies depending on it. The son of the daughter, though she may be the second daughter, better answers the description of first male heir than does the grandson of the eldest daughter. The first claims through one, the other through two females. That disposes of the claim of *Perratt*.

Then as to the claim of *Viney*. That claim rests exclusively on the doctrine that the first heir male cannot take during the life of the ancestor, and that Mrs. *Viney* died before the mothers of the other claimants. But the answer to this claim also is that the law will not allow an estate thus to remain in contingency; that the estate vested on the birth of the

(f) 2 Sir W. Bl. 1010.

first male who came within the description in the will; and that having once vested, as it did in *T. C. Winter*, it was not subject to be divested by any after event.

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Mr. *Cowling*, for the Defendant in Error:—It is admitted here, for the purpose of simplifying the case, that this is a devise in fee simple and not in tail; and the question for consideration may be confined to this, whether the lessor of the Plaintiff is entitled to recover? The answer must be in the negative. *Perratt* or *Viney*, either one or the other, has a better right than *Winter*. The grounds on which the argument on the other side has been put, are inconsistent with each other. The first of these relates to the time of birth of the individual, which seems to give *Winter* the advantage; but that is answered by the rule of law, that he cannot take until the death of the ancestor through whom he claims. The second relates to the priority of line, and then it is clear that *Winter's* title is not so good as *Perratt's*; even the reasonable presumption of what was the intention of the testator is against the claim of *Winter*. He was known to the testator; had he been intended to be treated as the heir, it cannot be supposed that the testator would have left the devise in this indefinite state as to him. That he was not mentioned by the testator shows that he did not, in the testator's mind and intention, fill the character of the first male heir. If the construction contended for on the other side is the right one, where is the use of the word *heir*? the words "first male" would have been sufficient.

The first ground of *Winter's* claim is thus satisfactorily answered in every respect. Then as to the next,

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that of seniority of line : The fact of his mother being alive at the death of the testator is fatal to his claim. At common law, where a person was to take as heir female, she must have been full heir ; that is not quite so now, but still the rule that *nemo est hæres viventis* is in full force. *Burchett v. Durdant* (g), *Glenorchy v. Bosville* (h), and *Goodright d. Brooking v. White* (i), have all been referred to on the other side, to show that an estate must vest immediately ; but they are not in point for this purpose, on account of the peculiarity of the words of the will in each case. They were in fact cases of exception to the rule of law, but the rule itself is not affected by them. Mr. *Fearne* (k) says, “ these cases operated by way of exception to the rule that *nemo est hæres viventis*, and consequently made this a vested limitation, which otherwise would, according to that maxim, have been contingent.” Here is nothing to make this case an exception to that rule ; the remainder is plainly contingent, and that fact distinguishes this case from those cited. There is no instance whatever where the word *heir* alone has been read “ heir apparent,” in the case of a contingent remainder. *Burchett v. Durdant* is an authority on that point. The words there were, “ male heirs of the body of the said *R. D.*, now living ;” and as there was an heir apparent of the body of *R. D.* then living, the words were held to apply to that particular individual, and so the case was decided on the ground that that was a *designatio personæ*. In the same manner, a devise “ to the heir of *John Styles* if his son *Thomas* should be then alive,” has been

(g) Carth. 154 ; T. Jones, 99 ; 1 Vent. 334 ; 2 Lev. 232, & S. C. 2 Vent. 311 ; Sir T. Raym. 330, nom. *James v. Richardson*.
 (h) Cas. Temp. Talb. 3-18. (i) 2 Sir W. Bl. 1010.
 (k) Cont. Rem. p. 325. (5th edit.)

■ held to be a devise of the remainder to the son *Thomas*, because he was particularly designated. But ■ that cannot be applied to a contingent devise; for an ■ estate, in order to vest at once, must have a particular ■ individual in whom to vest, which cannot be where ■ the very existence of the individual is contingent. ■ The argument on the other side would go to destroy ■ the possibility of a contingent remainder. The very ■ provision here, as to the legacies of 100 *l.* to the ■ daughters, shows that the devise was contingent. ■ What likewise are the expressions in the other parts of ■ the will, showing the intention of the testator? The ■ devise to *John Chilcott* is to him or his male heir; ■ that must mean the person who is heir after *John Chilcott's* death. The estate thus created was an ■ estate tail. If so, then it is in fact a construction put ■ by the testator himself on the other part of the will, ■ namely, that *heir* shall mean the heir of a deceased ■ ancestor. If that is so, then the rule as to priority of ■ line will apply, and *Perratt* is the person entitled.

It is not pretended that there would have been any ■ difficulty, had *Mary* the eldest daughter of *Richard Chilcott* had a son: but the fact that she had not, will ■ not prevent *Perratt* from coming in. The priority of ■ line is often preferred in the female. Eldest daughters ■ present to advowsons, and the testator may have preferred the descendant of an eldest daughter before the ■ son of a younger daughter. It is to be recollected too ■ that it was at first immaterial to ascertain who was ■ the first male heir of *Richard Chilcott*; for there was ■ then existing the estate tail to *John Chilcott*, and the ■ estate given after that estate tail might have been ■ barred.

A descendant stands in the same position as the ■ ancestor. The fourth rule or canon of descent is thus

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stated by *Blackstone* (l): "that the lineal descendants in *infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living." The testator might have thought that any descendant of the eldest daughter *Mary* would stand exactly in her place. Had he not chosen to act on these simple and well-known rules of law, he could easily have declared a different intention. He could have said, "I give to the son of any of *R. Chilcott's* daughters who shall first have a son." He did not say so, and his omission to do so indicates his intention that the rule as to priority of line should be carried out. If so, then the grandson stands in the place of the grandmother, and *Perratt* is entitled to the estate. The ordinary rule of construction favours this view of the case. In *Periman v. Pierce* (m), a case taken from Lord *Hale's MSS.*, it is said that first of blood must be taken to mean priority of line. This is decisive of the question. But if the House shall think that the difficulty to discover the real meaning of the testator is insuperable, *Winter's* claim will be equally defeated, for the devise will be void, and the heir at law of the testator will be entitled. But it is submitted that no such consequence need happen here. *Perratt's* claim is clearly better than *Winter's*, for the reasons already stated; but if it shall be held that the estate must go to the son and not the grandson of a daughter, then *Viney's* claim is superior to *Winter's*, for by the death of his mother, before her sister, *Viney* became the first person that the law could recognise as the heir of one of *R. Chilcott's* daughters. And this seems to be the best-established claim; the one most in accordance with the principles and rules

(l) 2 Com. 217.

(m) Co. Litt. 10 b. n. 2

of law, and therefore that which, in any uncertainty as to the precise meaning of the testator, will be preferred by this House.

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The *Attorney-general*, in reply :—The cases referred to in the opening were cited for the purpose of showing that in this will the word heir could not have any technical meaning, but merely that meaning which was given it by the testator. Here is an ignorant man who makes an obscure will. In such a case it would be absurd to apply a strict technical meaning to the words he uses.

As to *Viney*, the only ground put forward in his favour is, that his mother died first. But if the case of *Goodright d. Brooking v. White* is right, that a man may take living his mother, that argument is gone.

As to *Perratt*, his claim is answered by the circumstance that it can only be supported by preventing the estate from vesting, and by keeping it contingent to a period and in a manner which the law never will allow.

No effect is given in the argument on the other side to the word “first.” That word is important, and the condition it imposes is fulfilled by *Winter* and by him alone; and the estate having once vested in him, cannot be divested.

The possibility that in fact an estate tail may be barred, is one which in law is never considered. The law looks on an estate thus created as intended to go on for ever.

The argument that the estate must go to the heir at law if the will is uncertain in its provisions, does not apply here. It applies only to cases where the will has been made to disinherit an heir at law. No such

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intention existed here, for *John Chilcott* was the heir at law, and an estate tail was given to him. No will can be rendered inoperative by reason of evidence *dehors* the will, yet such would be the case here should the will be declared unintelligible on account of the state of the family. The will is clear, and *Winter*, who came into existence first, is the person who exactly answers the description in it, and in him the estate at once vested.

The *Lord Chancellor*:—Of the five questions formerly put to the Judges, I think that the first and fifth may be now omitted. The three others must be disposed of with their assistance, and I move that the learned Judges be desired to answer them.

Lord *Brougham*:—I agree with the Lord Chancellor as to the questions to be answered. We have heard a most able argument: I wish the case could be as easily decided as it has been ably argued.

The following were the questions proposed to the Judges on this occasion:—

1st. Was the expression “first male heir” used by the testator to denote a person of whom an ancestor might be living?

2d. At what time did this remainder first vest in interest?

3d. In what person did the remainder first vest in interest?

Lord Chief Justice *Tindal*, on the part of the Judges, asked for time to consider the questions; which was granted; and the further consideration of the case was adjourned *sine die*.

THE learned Judges attended on the 10th of May 1842, to communicate their answers to the questions.

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Mr. Justice *Coltman*:—To your Lordships' first question, I humbly conceive the answer ought to be, that the expression "first male heir" was not used by the testator to denote a person of whom an ancestor might be living. To ascertain in what sense these words were used, they should be considered in connexion with those which follow them. The devise is to the "first heir male of the branch of my uncle *Richard Chilcott's* family." These words have been considered by some of the learned Judges, who have on former occasions delivered their opinions on this case, as being equivalent to the expression "first heir male of my uncle *Richard*;" and if this is the correct sense to be put on the words, it would follow, perhaps, that the words "male heir" were used not in the strict technical sense of the words, but as designating simply male descendant.

But I humbly venture to think that such is not the meaning of the words "first male heir of the branch of my uncle *Richard Chilcott's* family;" for I cannot imagine that the testator would have used so clumsy a periphrasis to describe the first heir male of his uncle *Richard*, when in the preceding devise to *John Chilcott of London*, or his heir male, he uses simple and appropriate terms of description. Construing the one devise by the other, it seems to me that if by the latter devise he had meant to designate the first male heir of his uncle *Richard*, he would have used the same terms as he used in the former devise; and when I find him studiously selecting other terms, I think the just principles of construction require us to

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understand that he means something different in the latter case.

The words have been understood in a different sense by others of the learned Judges, and have been considered as equivalent to the words "first heir male of a branch, or of any branch, of my uncle *Richard's* family." On this construction of the words, the family of the testator's uncle *Richard* is considered as consisting of five branches; that is to say, each of *Richard's* daughters with her family is considered as constituting one branch. I humbly venture to doubt the propriety of this construction; for nothing, as it appears to me, can well be more opposed, both in grammar and sense, than the words "the branch," and the words "a branch, of my uncle *Richard's* family;" the former pointing definitely to some distinct branch, the latter indefinitely to one out of many. Such violence ought not to be done to the words used, if any more natural and appropriate sense can be given to them.

The sense in which I humbly think these words are to be understood will best appear from considering the pedigree of the *Chilcott* family. The *Chilcott* family originally consisted of three branches; the family of *Emanuel*, the father of the testator, constituting one branch; that of *John*, the father of *John* of *London*, constituting the second branch; and the family of *Richard Chilcott* constituting the third branch: and the expression "first heir male of the branch of *Richard Chilcott's* family," appears to me equivalent to the expression "first heir male of that branch which *Richard Chilcott's* family form of the *Chilcott* family." The party intended to take under this description must be of the branch of *Richard Chilcott's* family; that is to say, he must be a mem-

ber of *Richard Chilcott's* family, and he must be first heir male of that branch; in other words, he must be a descendant of *Richard Chilcott*; he must be an heir male, and he must be first heir male.

Now, in determining whether the words "male heir" in this devise are to be understood as denoting a person of whom an ancestor might be living, it is to be borne in mind that, although at the time when the will was made there was no member of *Richard Chilcott's* family who was an heir male in the strict sense of the word, it might well be that before the will would become operative by the death of the testator, there might be several members of the family who would answer that description: for instance, it might well be that two or more of the daughters of *Richard Chilcott* should die before the testator, leaving sons, or that one of the daughters should have left a grandson who might be her heir male, or other cases of like nature might have occurred by which different members of the family might have become male heirs; and these, not being remote and merely possible, but probable and proximate contingencies, may reasonably be supposed to have been in the contemplation of the testator in penning his will.

Now, bearing this in mind, and considering it as a settled rule that where technical words are used in a will they are to be considered as used in their proper and technical sense, unless there is some strong ground for inferring the contrary, I cannot in the present case see any sufficient reason for inferring that the words "male heir" were used in this will in any other than their proper and technical sense. I therefore think they were not used to denote a person of whom an ancestor might be living.

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To your Lordships' second question, I answer that, in my humble opinion, the remainder vested in interest on the death of *Betty*, the wife of *Thomas Viney*. The remainder in question would have vested on the death of the testator, if there had been at that time any person who answered to the description of "first male heir of the branch of *Richard Chilcott's* family;" but as there was at his death no male heir of the branch of *Richard Chilcott's* family (in the sense in which I think these terms ought to be understood), the remainder was necessarily contingent until there should be a male heir of that branch. When by the death of Mrs. *Viney* there was a male heir of the branch of *Richard Chilcott's* family, the remainder would vest in such male heir, if he could be considered as filling the description of first male heir.

This leads me to the consideration of what is one of the main difficulties in the case, namely, in what sense the word "first" was used by the testator. It evidently implies priority of some sort; whether priority in dignity and worthiness of blood (which to a certain extent is recognised even among coparceners), so that the issue of an elder sister should be preferred to the issue of a younger sister; or priority in point of time, so that he who first in point of time became an heir male should be preferred to one who subsequently became an heir male; or priority in nearness of descent to the original stock, so that the son of a younger daughter should be preferred to a grandson of an elder daughter,—may be matter of dispute; and if at the death of the testator there had been several members of the family answering the description of heirs male, it might have been very doubtful which of them answered the description of first heir male. But in the case which actually happened, in whatever

sense the word "first" was used by the testator, it seems to me that on the death of Mrs. *Viney*, her son and heir, being at that time the only heir male in the family, answered the description of first heir male, being evidently first in point of time, and in point of dignity and nearness first heir male, because only heir male.

It may be urged, in opposition to this mode of viewing the case, that although on the death of Mrs. *Viney* her son became heir male, and so at that time might be considered as first heir male in every sense of the word, yet if the word "first" means first in dignity and worthiness of blood, events subsequent to the death of Mrs. *Viney* might occur whereby there would be another heir male in the family who would answer more correctly to the description of first heir male; as, for instance, the death of Mrs. *Winter* or Mrs. *Parsons*. But to this objection I answer, that it is a fixed rule with respect to contingent remainders, that they are always to vest at the earliest possible moment at which they are capable of vesting; and therefore if, on the death of Mrs. *Viney*, *Thomas Viney* at that time answered the description of first male heir, the remainder will not continue in suspense, because it may turn out that on the happening of a certain contingency there would be a person more fully answering that description. It is like the case where an estate is given to *A.* for life, with remainder to the right heirs of *J. S.* If *J. S.* dies, leaving a daughter, and his wife *enceinte*, the remainder, according to the ancient rule of the common law, vested in the daughter; and though a posthumous son of *J. S.* were afterwards born, the remainder was not thereby divested, but on the death of *A.* the daughter

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was held to be entitled to succeed to the estate (n). And although in the instance of estates settled on children, since the case of *Reeve v. Long* (o), and the statute 10 & 11 Will. 3, c. 16, the application of this rule of the common law has been modified in favour of posthumous children, yet I apprehend the principle of the rule is in nowise affected by this relaxation of its application in the particular instance. The rule rests on the necessity there is, as above remarked, that every contingent remainder should vest at the earliest possible period; since, if it were allowed to remain in suspense, it might continue in suspense until after the determination of the particular estate, and the contingent remainder might thereby be defeated altogether.

On these grounds it seems to me that the remainder in question vested in interest on the death of Mrs. Viney: and to your Lordships' third question, the answer, in my judgment, ought to be, that it vested in *Thomas Viney*, for the reasons already stated in reply to your Lordships' second question.

Mr. Justice
 Maule.

Mr. Justice *Maule*:—In answer to your Lordships' first question, I am of opinion that the expression "first male heir" was not used by the testator to denote a person of whom an ancestor might be living. It is a rule of construction, founded in reason and supported by many authorities, that words in a will are to be construed according to their strict and proper acceptation, unless there be something to show that such a construction is not that intended by the testator. An heir, properly and strictly, means a

(n) Co. Litt. 95 a. 137 b.

(o) Salk. 227.

person whose ancestor is dead ; it is sometimes, when the context necessarily requires it, understood to mean an heir apparent. In the present case there appears to me to be nothing to show that any other than the strict and proper sense is to be given to the word heir.

In answer to the second and third questions, it appears to me that the "branch of my uncle *Richard Chilcott's* family," means that branch of the *Chilcotts* which consists of my uncle *Richard Chilcott's* family ; the testator having before mentioned another branch of the family, that is, *John Chilcott*, or his heir male lawfully begotten. Now, the family of *Richard Chilcott* consisted of five daughters, and the expression "heir male of the branch," by itself, might mean either an heir male who was heir of the branch, that is, of *Richard Chilcott* or all his daughters, which would be possible ; or, of the branch may mean belonging to the branch ; and between these two senses the latter is determined to be the true one, by the devise of 100*l.* to each of the daughters who shall be living at the time the said heir male takes. The devise, therefore, in effect is to the first heir male belonging to that branch, that is, to the first heir male of any of those daughters, and the remainder vested in interest as soon as any of the daughters died leaving an heir male ; that is, on the death of *Betty Viney* in 1804, when *Thomas Viney*, being her heir, was the first male heir of *Richard Chilcott's* family.

Mr. Justice *Williams*:—I am of opinion that the expression "first male heir" was used by the testator in the sense suggested by the question first proposed by your Lordships ; and in giving this answer it becomes necessary at once to explain the reasons

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which induce me to give it; which, in truth, involve a consideration of the whole case. In the first place, it seems to me that the general rule, that the will of the testator should be carried into effect if practicable, has its full bearing upon the present case, because, if anything can be said to be clear as regards the testator, this at least seems to be so, that he did not intend his heir at law to take the estate; for if so, he would have made no will at all, in which case he probably knew that the law would have given the estate to such heir; or if he did make a will, there would not have been the provision in favour "of the branch of *Richard Chilcott's* family."

It appears from the special verdict that there were three branches of the *Chilcott* family: one, of which the testator was the head, as being the son of the elder of the three brothers, *Emanuel, John, and Richard*; the second, the branch of *John Chilcott*, the second brother, to whose son, called "*John of London*" in the will, the first devise is; and the third was the branch of *Richard Chilcott*, in which the testator intended the *Truckwell* estate to go in default of issue male in the second branch.

The words of the will are, after the expiration of the three lives, "All the lands, &c. of *Truckwell* estate to come to *John Chilcott*, &c., or his heir male, if any; free land not to be sold, &c., but to remain in the *Chilcotts* family for land of inheritance;" then follows, "and if no male heir lawfully begotten by the said *John Chilcott*, then the above lands to fall to the first male heir of the branch of my uncle *Richard Chilcott's* family, yielding and paying unto such of the daughters of the said *Richard Chilcott* which shall be then living the sum of 100*l.* each, at the time of taking possession of the aforesaid estate:" and here,

before adverting to the second and more important clause of this will, I would observe that in the previous devise to *John of London*, the word heir is by no means certainly used in its technical and proper sense, for the devise is not to my kinsman, *John Chilcott*, living in *London*, and his heirs male, but “to him or his heir male,” if any. I notice this merely for the purpose of showing the testator’s use of the word heir in the former clause of the will, as bearing to a certain extent upon its use and meaning in the latter, because, as to the question arising upon *Richard’s* branch of the family, it is immaterial whether *John of London* took an estate in tail or for life.

The state of the family of *Richard Chilcott* is already before your Lordships; he left five daughters, but no son. *Mary*, the eldest of these daughters, had a daughter only, whose son, *Matthew Perratt*, is one of the claimants. The second, *Joan*, had a son, *Thomas Chilcott Winter*, older than any son of any other daughter. *Sarah*, the third, had two sons, whom it is not material to notice. The fourth, *Betty*, had a son, *Thomas Viney*, and, what is important in one view of the case, she died before the testator. The fifth, *Agnes*, also had a son, and they are both living. And upon this state of the family of *Richard Chilcott* the question is, whether any of the sons can take under the description of the “first male heir of the branch of my uncle *Richard Chilcott’s* family;” and if so, which? in pursuing which inquiry, the most orderly course, as it seems to me, is to ascertain, if it may be, the intention of the testator, and then to examine whether that can be carried into effect consistently with the known rules of law.

Before I proceed to do this,—which is in effect to answer the third and most important question pro-

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posed by your Lordships,—it may be convenient to premise who are not entitled to take under the will, about which there is much less difficulty, and, so far as I am aware, no difference of opinion. In the first place, then, I think there is no doubt but that the daughters of *Richard Chilcott* are excluded; they all technically constitute one heir, but the heir described in the will is one and a male. Moreover, they do not seem to have been in the contemplation of the testator with a view to any beneficial interest, but to be named merely as the persons from some of whom was to be born that male heir who was to take. For the same reason that heir in the singular number, and the first, is mentioned, it seems to me that the heirs male of each of the daughters, as constituting in the aggregate one heir, cannot be included; and also, as not being “the first,” that the grandson of *Richard Chilcott’s* eldest daughter, *Matthew Perratt*, is excluded by the interposition of his mother, which prevents that part of the description from being applicable to him. The claims therefore are, in effect, reduced to three: first, of the heir at law, upon the ground that the will has no sufficient certainty of meaning, and those of *Thomas Chilcott Winter* and *Thomas Viney*.

This being so, we come to that question upon which I am aware there is so much difference of opinion that I cannot do otherwise than offer mine to your Lordships with much diffidence. That opinion is, that it was the intention of the testator that the sons of *Richard Chilcott’s* daughters, if more than one, should be preferred in the order of their mothers’ seniority; and therefore if *Mary*, the eldest, had had a son, that he would have been “the first male heir,” and that the second daughter, *Joan*, being the first who had a son, that son, *Thomas*

Chilcott Winter, is entitled to take under that description; and further, that his mother being alive at the time of the testator's death is no objection to his so taking; or in other words, that the will is to be read as if the expression had been "first male descendant" of *Richard Chilcott*. To this construction I am aware is opposed the fact that the state of *Richard Chilcott's* family was well known to the testator; and therefore it is said, if any particular grandson of *Richard Chilcott* had been preferred, nothing could have been easier than to have named him in the will; and it cannot be denied that there is weight in the objection. It will be for your Lordships, however, to decide whether it is not in a great degree, if not entirely, removed by pursuing that intention of the testator which I assume to have existed, viz., that the son of the eldest daughter, if any, should have the preference; and if so the matter might well have been left open by the testator, seeing that up to the time of his death that chance remained, inasmuch as the age of the eldest daughter was, I think, about 46 at the time of that event.

To this construction also is opposed an alleged rule of law, that *Thomas Chilcott Winter* cannot take, because at the time of the testator's death the designation of "male heir" was wholly inapplicable to him; that the word heir has a fixed and settled meaning in the law, and that nothing in this case can warrant a more loose or popular interpretation. I am not aware of any other objection in point of law. For, suppose each of the daughters of *Richard Chilcott* to have had a son, and of these that the son of the second daughter was first born, and further, that all the daughters died in the lifetime of the testator, is it said in this supposed case that the son of the second

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daughter, as being the first born, would take as first male heir? *Thomas Chilcott Winter* would have that claim: or is it said that the son of the eldest daughter, as being the nearest to her father (for so she was by the admission of most of my learned brothers), would be entitled? *Thomas Chilcott Winter* would have that claim also. It seems to be plain, therefore, that the life of his mother at the time of the testator's death, and his not being heir according to the legal maxim, constitute the objection, and the only one, to the construction which I submit to your Lordships; and the weight of that objection must depend upon the greater or less degree of clearness with which the intention of the testator appears fairly to warrant that construction. Before, however, I examine it further, I cannot help observing that,—in the case of such a will, so inartificially and clumsily composed, some (if not the majority) of my learned brothers are of opinion that no certain or even intelligible meaning can be extracted from it, owing to such rude and perplexed composition, and that for default thereof the claim of the heir at law must prevail,—it is a far-fetched and somewhat startling supposition that the testator must have been conversant with *Coke* upon *Littleton*, and the profound maxim that *nemo est hæres viventis*.

Upon this question, the existence of the rule and the relaxation of it, I must not forget that your Lordships are already in possession of a most minute and learned examination of the authorities bearing upon it (*p*). To cite those cases again, and to comment upon them, would be to assume an appearance of research certainly not real, and to trouble your Lord-

(*p*) 5 Barn. & C. 48; and 10 Bingh. 198.

ships at much length upon a point which will be found not to be really in dispute. Neither the existence of the rule generally, nor its relaxation in certain cases, is denied. This I think will be sufficiently apparent when I remind your Lordships of the manner in which Mr. Justice *Holroyd* and Mr. Justice *Littledale*, who were in favour of using "the term of art" in its technical and strict sense, state the result of the authorities as to the rule and the exception. Mr. Justice *Holroyd* is reported (*q*) thus to have expressed himself: "If it appeared plainly by the will to have been the testator's intention that an heir male apparent should take by the devise, I agree that the rules of law would not prevent the giving such a construction to the will as to carry that intent into effect." Mr. Justice *Littledale* is thus reported (*r*): "All these cases, therefore," (cases in favour of my construction), "only come to this, that if there be sufficient upon the will to show that the word heir is used in the will in such a way as proves the testator to have meant heir apparent, it shall be so considered as he intended it; but they prove nothing more." And that is all, with all possible respect be it spoken, that they are required to prove, consistently with my view of the case. So that it is obvious, from the statement of the question by these truly learned Judges, that it comes round to this in each case, what was the intention of the testator? because, if that be apparent, *ex concessis* the rule will yield to the exception. Instead, therefore, of citing *in extenso*, I will content myself with referring generally to the authorities which I consider to be amply sufficient for my purpose. They are, *James v. Richardson* (*s*),

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(*q*) 5 Barn. & C. 77.

(*s*) Sir T. Raym. 330.

(*r*) *Id.* p. 64.

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Darbison v. Beaumont (t), and especially *Goodright v. White* (u), in which Lord Chief Justice *De Grey* seems to have established the exception which Mr. Justice *Holroyd* and Mr. Justice *Littledale* admitted.

In order, however, that the relaxation of terms of art, or of the strict legal sense of a word into popular meaning, may not appear to be a modern doctrine, I take leave to cite to your Lordships the case of *Hill v. Grange* (v). That was an action of trespass for breaking and entering a house and certain closes of land. Plea, that the said house and closes were "one messuage, and 100 acres of land to the same appertaining," stating a lease, &c. Much argument took place upon the effect of this allegation, "land to the said messuage appertaining," which all the Judges agree was (in the true and legal sense of the word) equivalent to the words, "to the said messuage appertenant." The report however states, that the Judges, when they came to consider the language of the lease, agreed that when "appertaining" is used with the other words, it cannot have its proper (that is, its strictly legal) signification (as in pleading, it must be understood), and therefore that it shall have such meaning as was intended between the parties, or else it would be void, which it must not be by any means, for it is commonly used in the sense of "occupied with," or "lying to;" and forasmuch as it is commonly used in that sense, it is the office of the Judges to take and expound the words which common people use to express their meaning, according to their meaning; and therefore it shall be taken here not according to the definition of it (that is, its true legal meaning),

(t) 1 P. Wms. 229.
 (u) 2 W. Blacks. 1010.

(v) 1 Plowd. 170.

because that does not stand with the matter, but in such sense as the parties intended it. And many other cases were put (as the report adds) where the word shall be taken out of the natural (that is, in conformity to the context, the legal) meaning, but according to that of the party.

Upon the whole, it seems to me that the intention of the testator was in favour of *Thomas Chilcott Winter*, and that there is no rule of law preventing that intention from being carried into effect; and that therefore *Isaac*, his heir, is entitled to take under the will.

These observations furnish my answer to the first and third questions proposed by your Lordships. As to the second, it follows, from my view of the whole case, that the remainder first vested in interest in the said *Thomas Chilcott Winter*, upon the death of the eldest daughter, *Mary*, without issue male, because until that event happened it was contingent whether he would become entitled or not.

Mr. Justice *Patteson*:—In answer to your Lordships' first question, I am of opinion that the expression "first male heir" was used by the testator to denote a person of whom an ancestor might be living. If the expression had been used with reference to any particular individual by name, as if, for instance, the words had been "the first male heir of *Mary Bishop*," I should have had much difficulty in coming to this conclusion, because the authorities show that the rule *nemo est hæres viventis* would apply; and it is clear that if an estate be left to *A.* for life, with remainder to the heir of *J. S.*, and *A.* die in the lifetime of *J. S.*, the remainder is void, there being no person who at the death of *A.* answers the description of the heir of

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J. S., though no one can doubt that such was not the intention of the testator. Here, however, the expression is used, not with reference to any particular individual by name, but to "the branch of my uncle *Richard Chilcott's* family." *Richard Chilcott* was dead, and had left five daughters and no son; there were, therefore, five branches of *Richard Chilcott's* family, and if the words be taken in their literal sense, it is quite uncertain which of those five branches is meant by "the branch of my uncle *Richard Chilcott's* family." To avoid this uncertainty, it is argued that the words "the branch of my uncle *Richard Chilcott's* family" are to be read as if they had been "my uncle *Richard Chilcott's* branch of the family;" words of very different import, and I know not by what rule of construction I am at liberty so to read them. But assuming that I am at liberty so to read them (as all the Judges who have delivered opinions in this case do assume), then the words will stand, "the first male heir of my uncle *Richard Chilcott's* branch of the family:" still those are not technical words; they have no certain legal sense, according to any authority which I can find. The word "family" in a devise has indeed received a construction in several cases; *Chapman's Case* (x), *Wright v. Atkyns* (y), *Doe v. Smith* (z); in all which the word "family," in devises of remainder to the "family of *J. S.*," has been held to mean the heir of *J. S.*: so here it appears to me that if the word "heir" must be taken in its strict legal sense, the words would mean, "the first male heir of my uncle *Richard Chilcott*." Now this is clearly not the sense in

(x) *Dyer*, 333.
 (y) 1 *Ves.* 255.

(z) 5 *M. & Selw.* 126.

which the testator used them, for he evidently meant to denote some single individual by the words "first male heir," yet no single male individual could be heir of *Richard Chilcott* until all the five daughters were dead; nor then unless four out of the five daughters had died without issue, or at all events unless the issue of four out of the five had failed; all which is quite inconsistent with the direction, that the first male heir on taking possession should pay to each of the daughters of *Richard Chilcott* who should then be living, 100 *l.* No one could be sole heir of *Richard Chilcott* as long as any one of those daughters was living. The words, therefore, do not mean the first male heir of *Richard Chilcott*; they must denote some male descendant of *Richard Chilcott*, who yet was not his heir. Whose heir then was it intended to denote? Not the heir of any particular individual, but of *Richard Chilcott's* branch of the family; the heir of the whole of that branch of the family would be the same as the heir of *Richard Chilcott* himself, whom I have already shown not to be the person meant. If then the word "heir" is to be taken strictly, it must mean the son of one of the daughters who should be dead; and yet he would only be heir of his mother, not heir of the branch of the family. Again, if all the daughters survived the tenant for life, there would, on the determination of the particular estate, be no person answering the description of "male heir," by reason of the rule *nemo est hæres viventis*, and not only must the devise become void, but the daughters be deprived of the 100 *l.* each, which is given them; whereas it is quite plain that the testator intended that all of them who should be living at the death of the tenant for life should have 100 *l.*

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For these reasons, looking at the will and at the status of the family, it appears to me that the testator meant by the words "first male heir" to denote the first male descendant of *Richard Chilcott*, without regard to whether his ancestor was living or not. It is said, that if such was the testator's intention, it is strange that he should not have pointed out by name the person whom he intended. This observation may be very just; but it may be answered, that, though four of the daughters had a son, the eldest had not, but only daughters, nor a grandson, and yet she might have had a son or grandson born afterwards; and the testator's intention may have been such that a son or grandson so born may have come within it (though, as I shall state afterwards, I cannot clearly discover that it was), and the testator may, for that or some other reason, have purposely omitted to name the individual. Probably, as it seems to me, the testator meant to describe some person who should be living at the death of the tenant for life, some one who should then be "first male heir," which must of necessity be a matter of uncertainty at the time of making the will.

The authorities upon the question as to when and under what circumstances the word "heir" may in a will be taken in a sense different from its strict legal meaning, have been so thoroughly sifted and examined, in the opinions which have been pronounced in this case in the Court of Queen's Bench and your Lordships' House, that I cannot hope to throw any further light on the subject by a detailed examination of them. They appear to me to establish this proposition, that, *prima facie*, the word "heir" is to be taken in its strict legal sense, but that, if there be a plain demonstration in the will that the testator uses

it in a different sense, such different sense may be assigned to it. What amounts to that plain demonstration must in each case depend on the language used and the circumstances under which it is used, and is not a question to be determined by reference to reported cases, but by a careful consideration of that language and those circumstances in the particular case under discussion.

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In answer to your Lordships' second question, I am of opinion that the remainder vested, if at all, at the death of *Mary Bishop* in 1799. So long as she lived the law contemplates that she might have a son who might possibly have answered the description in the will, but upon her death, as she left a grandson then living, and as each of the other daughters had then a son, the right of the person entitled under the description in the will could not be altered by any subsequent events, and therefore the remainder must vest; it being an admitted rule that remainders shall vest as soon as possible.

The third question put by your Lordships is, in my judgment, very difficult to answer, and I must confess that, after fully considering all the very plausible arguments which have been adduced in favour of the different claimants, I cannot satisfy myself that any of them are sound, nor can I discover any rule of construction which enables me to form more than a probable conjecture as to the meaning of the testator's words. I apprehend that probable conjecture is not a safe or sufficient reason for affixing a meaning to the words, and I am therefore obliged to say that, in my opinion, this part of the will ought to be held void for uncertainty. The most strict and technical

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argument appears to me to be that which is urged in favour of *Thomas*, or rather *Catherine, Viney*, but then it is grounded on the supposition that the words "first male heir" mean a person of whom no ancestor is living, and I cannot bring my mind to the conclusion that such is the true meaning of those words.

If the *Vineys* be excluded, then the question is between *Matthew Perratt* and *Isaac Winter*, and will depend on the meaning of the word "first," prefixed to the words "male heir," taken in the sense of "male descendant;" whether it means the male descendant of the eldest daughter, she being the first in birth of the family of *Richard Chilcott*, and according to some authorities the more worthy, or the male descendant who was first born in order of time, from whichever daughter he might descend, or the male descendant who traces through the fewest females, and so is in some sense the first of the generation after *Richard Chilcott's* daughters, that is, the son of the eldest of the daughters who had a son, viz. *Isaac Winter*, and who would also be first as compared with *Matthew Perratt*, as being less remote from *Richard Chilcott*. Any one of these interpretations of the word "first" would, as I apprehend, be consistent with decided authorities, and yet there is no authority which makes any one of them preferable to the other as a matter of law; neither is there anything in the will which at all leads my mind to any opinion as to the interpretation which the testator himself would have adopted if the question could have been asked him. As, therefore, I am in complete uncertainty as to the testator's actual meaning, and as I have no rule of law to guide me, no technical sense which I am bound to affix to the word "first," it appears to me that the well-known rule must prevail, viz. that an

heir shall not be disinherited except by express words, and that this part of the will being uncertain is void and inoperative.

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Mr. Baron *Parke*:—My answer to the first question proposed by your Lordships is, that in my humble opinion the expression “first heir male” was not used by the testator to denote a person of whom an ancestor might be living. It is a rule in the judicial exposition of wills, that technical words, or words of known legal import, are to be considered as having been used in their technical sense, or according to their strict acceptation, unless the context contain a plain indication to the contrary. Such is the rule laid down by Lord Chief Justice *Eyre*, in *Buck v. Norton* (a); by Lord *Alvanley*, in *Thelluson v. Woodford* (b); and in *Poole v. Poole* (c), citing *Goodright v. Pulleyn* (d); and lastly, by Lord *Redesdale* in *Jesson v. Wright* (e), and other authorities. That this rule is well established admits of no doubt; and it is a sound and salutary principle of construction, which affords the best chance of attaining a reasonable degree of certainty in the exposition of testamentary papers, to abide steadily by general rules, and not to indulge in conjectures of the supposed intent of the testator. Upon this subject I cannot forbear referring to a passage in Mr. *Fearne*’s work (f), in which this doctrine is ably enforced:—“Certain established maxims as to the legal import and effect of technical expressions, will render the decision of titles to property as little dependent as the nature of things will admit upon the occasional opinion, humour, ingenuity, or

(a) 1 Bos. & P. 57.

(b) 4 Ves. 329.

(c) 3 Bos. & P. 620.

(d) 2 Ld. Raym. 1427.

(e) 2 Bli. 1.

(f) Cont. Rem. p. 136.

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caprice of the Judge, and are therefore most proper and sure grounds for titles to rest and depend upon."

Adopting, then, this rule of construction, the word "heir," in its strict legal acceptance, cannot be applicable to any one whose ancestor is living; *nemo est hæres viventis*. That word must therefore be read, in the will in question, with its appropriate meaning, unless the context contain a plain indication to the contrary. No one can take "by a devise to an heir who is not heir indeed, without demonstration plain," to use the language of a marginal note in *Hobart* (p. 33), sanctioned by Lord Chief Justice *Bridgman* (*Bridgman*, 413), and Lord Chief Justice *Eyre* in the case referred to. It seems to me that there is nothing in the context of this will which amounts to "demonstration plain," or anything like a plain indication, or indeed any indication, that the testator meant to use the word heir in any other than its primary acceptance. There is no doubt that the word "heir" is capable of being applied to one whose ancestor is living; and there are cases where the context has been, in the opinion of the Court, sufficiently clear to call upon it to construe the word in its improper or secondary acceptance; such as the case of *Darbison v. Beaumont* (g), and *Goodright v. White* (h). Whether in all these cases the circumstances relied upon amounted to a clear indication of the intent of the testator to use the word "heir" in other than its strict sense, so as to satisfy the rule laid down in the cases above referred to, and now established, it is not necessary to inquire. In the present case no similar circumstances exist; and it appears to me to be a mere conjecture, and that upon a slight foundation, that

(g) 1 P. Wms. 229.

(h) 2 W. Blacks. 1010.

the testator intended to make any but a very heir the object of his bounty.

Assuming, then, that the testator did not mean by the word "heir" an heir apparent, I proceed to the consideration of the second and third questions proposed by your Lordships, which can be most conveniently taken together.

What was intended by the expression "first male heir of the branch of my uncle *Richard Chilcott's* family?" That it must be some one who fills the character of heir to some deceased member of the family, is, for the reason before given, quite clear; that he must be a male heir is also clear; but what is meant by the term "first," or by "the branch of my uncle *Richard's* family," is by no means equally so. The latter expression is inaccurate, and must be understood to mean the first male heir of that branch of our family which consists of my uncle *Richard Chilcott's* family; or, in other words, the "first male heir of my uncle *Richard's* branch of our family." What is meant by the term "heir of my uncle *Richard's* branch," and by the term "first?" That he must be one individual, and not all who collectively answer the description of heir, is very clear; but must he be that person who, being a "male," is the true heir of some deceased member of that branch of the family, or must he be the true heir of *Richard* the uncle? That the latter was not intended, may be collected from the context; there could be no single true male heir of *Richard* till all the stocks of the daughters but one were extinct, which is a very remote contingency; yet the testator contemplated an heir who might have to pay to more than one of the daughters of *Richard* the sum of 100*l.*

It follows, therefore, that the heir intended by the

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testator was the heir of some other deceased member of that branch of the family. Which of these will answer the description of "first?" It seems to me that when the word heir is determined to be not "heir apparent," but very heir, there is little or no difficulty in deciding on the meaning of this term, whatever there might be if the word heir were to be construed as heir apparent. The ordinary meaning of the word "first," when applied to a person who at some future period should fill the character of very heir, is, I think, the first in order of time who does so; and the language of a will ought to be read in its ordinary sense, unless the context or the facts to which the will is to be applied require a different construction. If the very heir of the first or eldest of the daughters had been intended, the term "first" would have been applied to the daughters, not to the heir. My humble opinion therefore is, that the first male descendant of the daughters who filled the character of very heir to any of them, was entitled under this devise; and consequently, to the second of your Lordships' questions, I answer that the remainder vested in interest on the death of *Betty Viney* (the fourth daughter of *Richard*), that is, on the 15th *May* 1806; and to the third, I answer that it vested in *Thomas Viney*, her son, who on her death became her very heir, and was the first of the descendants of the uncle *Richard* who was heir at law in the proper legal sense of that word.

Lord Chief Justice *Tindal*:—Having had the honour of stating to your Lordships, upon a former occasion, the opinion which I had formed (*i*) on the several

(i) 10 Bingh. 234.

questions now submitted to Her Majesty's Judges, and finding no reason to vary from the opinion which I then formed, I hope I shall stand excused if I simply refer to the answers before given by me to the first and second questions, confining myself at present to the discussion of the last, which is the most important question in the determination of this case. The consideration of the last question involves in it the construction of the will of *Emanuel Chilcott*, and in effect calls upon us to state who it was the testator intended should take in remainder, by the description contained in his will, "the first male heir of the branch of his uncle *Richard Chilcott's* family?" The first inquiry would seem to be, whether any person could fill out and answer the description contained in the will, "first male heir of the branch of his uncle's family?" And if the word "first" had not been found in the will, and the devise had been simply to the "male heir of the branch of his uncle *Richard's* family," it is possible, though, in the state of the family at the time the will was made, in the highest degree improbable, that upon certain events taking place, the description contained in the will might have been satisfied; for if, before the time when the remainder must vest by law, all the daughters of *Richard* had died without any of them leaving issue except one, and that one leaving a son or a male descendant, such son or male heir might be considered "the male heir of the branch of his uncle *Richard's* family," within a certain latitude of expression; such person being at the same time the direct heir male of one of the daughters of *Richard* and the heir of the other daughters, and thus uniting in himself the character of heir male to the several coparceners, and in some sense that of heir male of his uncle *Richard's* "branch of

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the *Chilcott* family," which is probably what the testator intended by the expression "the branch of his uncle's family." But neither did such an event ever happen, nor at the time of making the will was such a state of the family within the reach of probability; for at that time, of the five daughters of *Richard*, *Mary*, the eldest, had four daughters; *Joan*, the second, who had married *Winter*, had two sons; *Sarah*, the third, who had married *Parsons*, had two sons; *Betty*, the fourth, who had married *Viney*, had one son; and lastly, *Agnes*, the youngest daughter, who had married *Greenslade*, had also a son.

But the will further contains within it the word "first," in addition to the description before adverted to; the devisee is to be not only "the male heir of the branch of his uncle *Richard's* family," but "the first male heir" of that branch; words that import in themselves a discrimination or selection of some one out of several of the same description or class. Whilst at the same time the will shows the express intention of the testator, that some at least of the five daughters of *Richard*, if not all of them, might be alive at the time when this first male heir should take; for the heir who takes is charged with the payment, "unto such of the daughters of the said *Richard Chilcott* who should be then living," of the sum of 100*l.* each.

In the case of such words of devise, and of a family the several members whereof were in this state within the testator's knowledge, I cannot bring myself to think that by the expression "first male heir of the branch of my uncle *Richard's* family," the testator could possibly mean "heir," in the strict legal sense required by the maxim *nemo est hæres viventis*; that is to say, that in order to take the remainder, he

intended the first male heir must be a person who had become very heir, by the death of his ancestor, before the remainder was to vest; but I think he had in his mind some general and popular notion of "a male descendant" of the branch of his uncle *Richard's* family, and nothing more. And the present case, as it seems to me, falls rather within those in which Lord *Hobart*, in the case of *Counden v. Clarke (k)*, states, there is "declaration plain" that the testator intended the word heir should not be confined to its strict legal meaning, but should be taken in the more popular sense of heir apparent or presumptive; for the testator knew that his uncle was then dead without leaving a son; he knew, therefore, that there could be no male heir of *Richard*, strictly and properly so called; he knew also that whoever took as male heir must be a male descendant of one of the five daughters of *Richard*; and he must, as I understand the will, have meant such male descendant to take, whether his mother was dead or living, because the will provides that such of the daughters as were living at the time of the vesting of the remainder were, without any restriction, to receive payment of their several legacies from the devisee; so that consistently with this will the heir might be called upon to pay his mother, that is his ancestor, who was then living. Again, the testator never could have intended that if all the daughters were living at the time the remainder ought to vest, such remainder should fail, and with it all the legacies fall to the ground; and yet such would have been the necessary consequence if the daughters had all been alive, and it is held that no one can take who is not an actual heir.

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(k) Hob. 32.

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I am, therefore, satisfied, as I have already stated, that the testator used the phrase male heir, not in its strict legal sense, but in its popular acceptance, as "heir male apparent," or "male descendant;" and that the great difficulty of construction arises from the introduction of the word "first" into the devise, so as to make it necessary to determine who is the "first male heir" or "first male descendant" of the branch, within the testator's meaning.

I agree entirely in the position, that where the devisor uses a legal technical term, it must be construed strictly, unless a plain intent to the contrary appears on the will itself. But I cannot consider the expression "male heir of the branch of a family" as any legal expression or word of art; the law neither acknowledging such phrase, nor knowing or defining who the heir male of a branch of a family is, though it both knows and defines who is the heir male of an ancestor. I cannot therefore feel the weight of the argument, that the expression "male heir" must be construed strictly in this case; for that is to take part only of the testator's expression in his will, not the whole of it, and to give a strict interpretation to part, omitting altogether the rest.

It appearing therefore to me, that the will is to be interpreted as if the remainder had been limited to the first male descendant of the testator's "uncle's branch of the family," and from my being unable to determine from the words of the will to which claimant the word "first" ought to be applied, the conclusion at which I arrive is, that the will is void for uncertainty, and that the heir at law ought to take. I readily agree, that to hold a devise to be void for uncertainty is the last resource to which any Court should be driven in the interpretation of a will, but

that cases must and do sometimes arise in which it is necessary to come to that conclusion, must also be admitted. Chief Justice *Hobart*, in his judgment in *Counden v. Clarke*, says (*l*), "We must pass between two main grounds so as we offend neither: one, that the devise must be taken according to the intention of the party devisor; the other, that such intent must be so expressed in the will written that it may be certain to the Court and not against law."

What certainty or ground of certainty can the Court see in the present will, to guide them to the meaning of "first male heir?" Does the testator mean "first" according to dignity of descent, as coming from the elder and worthier branch? Then *Matthew Perratt* is the first male heir, as was the opinion of the late Mr. Justice *Taunton* and of Mr. Justice *Bosanquet* (*m*). Or is it to be the first born in order of time? Then the claim of *Isaac Winter* is to be preferred, as was the continuing opinion of the late Mr. Justice *Bayley*, both in giving his judgment upon the original argument in the Court of King's Bench (*n*), and also afterwards when he stated his opinion to your Lordships' House (*o*). Or is it to be interpreted the first who is actual heir male by the death of his mother, that is, the son of such one of the five daughters of *Richard* who dies first? Then is *Thomas Viney* to be considered as such heir male, according to the opinion of both Mr. Justice *Littledale* and the late Mr. Justice *Holroyd*, upon the argument of this case in the King's Bench; Mr. Justice *Littledale* still retaining that opinion when he was called upon to declare it in this House.

The opinions of these eminent Judges are fortified

(*l*) Hob. 32.

(*m*) *Supra*, 612 & 623.

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(*n*) 5 Barn. & C. 84.

(*o*) *Supra*, 639.

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and supported by such strong arguments in favour of each respective claimant as to leave the mind in complete doubt and hesitation which way the decision should preponderate, and I am not ashamed to say that I am unable to attain that certainty as to the testator's intention, which will justify me in offering an opinion to your Lordships which of the claims is entitled to the preference.

Under these circumstances, I think the testator has not done enough to intercept the descent to the heir at law, by describing in terms that are clear and intelligible who it is he means should take as the *haeres factus* or devisee. In many cases the Courts have held that where the devisee is left absolutely uncertain the devise must fail. I will instance a few only: a devise to the two best men of the guild or fraternity of the White Towers, the devise is void, because there being no such fraternity by charter or prescription, the Court cannot decide who the two best men are. They are not persons known, and there is no certain intendment to be collected from the words of such a devise (*p*). A devise to one of the sons of *J. S.*, he having several sons, the devise is void for uncertainty, and cannot be made good (*q*); or a devise to his son *John*, he having two sons of that name, and no direct proof which was meant (*r*); and this case appears to me to fall within the doctrine laid down by Chief Justice *Rolle*, in the case of *Beal v. Hyman* (*s*), where the testator devised one-half of his lands to his wife, and after her death all his lands to the heirs male of any of his sons or next of kin. The Chief Justice says, "the intention of the testator here is *cæca et sicca*, and senseless, and cannot be known,

(*p*) Fitz. Ab., Dev. 7.
 (*q*) Sir T. Rayn. 82.

(*r*) 5 Co. 68 b.
 (*s*) Styles, 246.

and we ought not to frame a sense upon the words of a will where we cannot find out the testator's meaning;" and lastly, in the late case of *Doe v. Joinville* (t), the Court of King's Bench held the devise to be void for uncertainty, where the testator had devised a remainder "to his brother and sister's family," one of his sisters being dead, leaving children, so that it could not be collected who were meant; and therefore in the present case, because I cannot satisfy myself from the words of the will who it was the testator meant by the "first male heir of the branch of his uncle *Richard's* family," I do, in answer to the third question proposed by your Lordships, state my humble opinion to be, that the devise is void for uncertainty, and that the heir at law ought to take.

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Lord *Brougham*:—In this case I shall not trouble your Lordships with reading the will upon which the questions have arisen, because that has been so frequently before your Lordships, and indeed parts of the will will be immediately referred to so necessarily, that it is not needful I should trouble you with reading it before entering upon the case.

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The first difficulty which arises in construing this will is upon the words, "the branch of my uncle *Richard Chilcott's* family who lived at *Hancrich Farm*;" and if this clause had stood alone, the difficulty might have been greater, than I think it is, of construing those words. But the testator had before given the lands and houses in question, after the determination of the prior estates for life which he had created, in remainder to his "kinsman *John Chilcott*, living in *London*, or his male heir," and for default of such

(t) 3 East, 172.

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issue, over; which, whatever construction we may put upon the devise as to the estate given, clearly indicates his having in contemplation *John Chilcott*, his cousin, and the part or branch to which he belonged of the family. Then he refers to that family by the name of the "*Chilcott* family," in directing that the freehold land thus given to *John Chilcott* shall not be sold or mortgaged, but remain in the family. Immediately after this he provides for the case of *John Chilcott* having no "male heir,"—he, *John Chilcott*, having a daughter then living,—and in that event gives the remainder to "the first male heir of the branch of his uncle *Richard Chilcott's* family."

It appears thus sufficiently plain that he had in view the *Chilcott* family as divided into three branches: first, his own, the eldest, the extinction of which he assumes, only giving life estates to those connected with it by affinity; secondly, the branch of his eldest uncle, the next brother of his father, and to them he gives the estate; whether in remainder to his male heir as a purchaser or not, may be made a question, but a question which for our present purpose is unnecessary to be considered; and lastly, the third branch of the family, that issuing from *Richard*, his father's youngest brother; and to this third branch he gives the remainder expectant upon the failure of male heirs of the second.

The words considered to be inaccurate, and supposed to cast doubt upon the meaning, are these: "the branch of *Richard Chilcott's* family." But I can hardly so regard them, for he was clearly dealing with this third branch as contra-distinguished from the second, that of *John*, and he terms *Richard Chilcott's* family this third branch. The *Chilcott* family is considered as the whole, and to consist of three

branches: one branch is his own; a second is *John Chilcott's*; the third branch consists, not, as in his own and *John Chilcott's* case, of one or two individuals, but of a numerous body, namely, *Richard Chilcott's* family; and he describes this third branch accordingly as "*Richard Chilcott's* family," as if he had said, "that branch of the *Chilcott* family which consists of *Richard Chilcott's* family, and not my father's family, or my uncle *John's* family." I have yet to learn that a particular family may not correctly enough be considered as a branch of a whole family, or that we may not say accurately enough,—certainly intelligibly enough,—the branch of the *Bourbons* or of the *Bourbon* family, consisting of the *Orleans* family; or the *Carlisle* family, a branch of the *Howards* or of the *Howard* family.

"Male heir of the branch" has in the course of the argument been spoken of as presenting some definite legal idea; and if the reading I have given of the words "branch of *Richard Chilcott's* family" be not the true one, some such meaning must be resorted to. But these words do not seem to possess any intelligible sense in law. "Heir of the body," or "heir male of the body," or "heir of line," or "heir general," all these are expressions of a known and received sense. "Heir, or male heir, of the branch," has none; and, therefore, it must be taken in the sense given by the context, and consistent with the scope of the will.

The word *family* is certainly not to be taken as technical. It has in different cases received a technical construction, but that was where it necessarily must be taken out of its more ordinary and popular meaning, as in *Doe v. Smith* (u), where a remainder

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(u) 5 M. & Selw. 126.

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1. The first step in the process is to identify the problem or issue that needs to be addressed. This involves gathering information and understanding the context of the problem.

2. Once the problem is identified, the next step is to define the objectives and goals of the project. This helps to clarify what needs to be achieved and provides a clear direction for the team.

3. The third step is to develop a plan or strategy to address the problem. This involves breaking down the problem into smaller, manageable tasks and determining the resources needed to complete each task.

4. The fourth step is to implement the plan. This involves putting the strategy into action and monitoring progress to ensure that the project is on track.

5. The final step is to evaluate the results of the project. This involves assessing the outcomes against the objectives and goals and identifying any areas for improvement.

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the will, leaving only daughters. But so neither could "heir" signify the true heir of *Richard Chilcott*, or of the branch or the family, meaning the heir of the whole or the heir of *Richard Chilcott*, because the coparceners or their heirs taken together were in law that heir, and the clause plainly imports that one, and not many, was to take the remainder; and for the reason already assigned the taking could not be postponed till all but the male heir of one should fail, both because such postponement is against the rules of construction with respect to remainders, and because the gift to surviving daughters supposes the remainder to vest in possession while some of the daughters are themselves living.

We may therefore conclude, first, that some individual of *Richard Chilcott's* branch of the family is intended; secondly, that one individual is intended, to the exclusion of the coparceners and their heirs; and, thirdly, that this individual is not the male heir of *Richard Chilcott*. The question now comes to be,—and the question in which nearly all the difficulty lies,—who this person is? Who is the first male heir of *Richard Chilcott's* family?

We may in the outset observe, that there are certain principles fit to be kept in view when we are called upon to construe a will which raises such doubts as the present has raised. One is, and the most material, that the leaning should be towards taking technical words in their technical sense, and only suffering ourselves to adopt another meaning when there can be no reasonable doubt from the context that in such sense the testator used them, and that he could not have used them in their known or legal sense. This rule is founded upon a consideration of the risk that we run, in allowing a scope for conjecture and fancy,

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of making a will for him which neither he himself made nor the law recognised; and if it be said that, by adhering to the technical sense we shall sometimes run the risk of giving a construction which the testator did not intend, the answer is, that this risk is common to both courses, and we avoid that other and perhaps greater evil of introducing uncertainty into the foundation upon which titles rest. The authorities are numerous which confirm this doctrine, and the cases are numerous and familiar in which it has been acted on; the rule being that the technical meaning of technical expressions shall only bend to a manifest intention, clearly shown, of using them in a popular sense. The arguments of Lord *Eldon* and Lord *Redesdale* need only be cited, when deciding a case which excited much interest in the profession, that of *Jesson v. Wright* (x), where the decision of the Court of King's Bench was reversed, and a devise to *A.* for life, remainder to the heirs of his body in such shares as he should appoint, and for want of such appointment to the heirs of his body as tenants in common, was held to give an estate tail to *A.*; the contrary doctrine in *Doe v. Goff* (y) being also overruled. Lord *Redesdale* observed, that it is not an accurate expression of the rule to say, "the general intent shall overrule the particular; but the rule," said his Lordship, "is, that technical words shall have their legal effect, unless from subsequent words it is very clear that the testator meant otherwise." But the same doctrine had repeatedly been laid down in the Courts below, and was never more strongly enforced than by Lord *Atvanley* in *Poole v. Poole* (z),

(x) 2 Bli. 1.
 (y) 11 East, 668.

(z) 3 Bos. & P. 620.

where it was in vain sought, by insufficient reference to other parts of the will as indicating intention, to make heirs of the body words of purchase: "words are to be taken in their ordinary sense (meaning the technical sense, as words of limitation), unless the testator has demonstrated an intention to put a different sense upon them." He afterwards says, "my brothers agree with me in thinking that this rule must be rigidly observed," meaning the technical rule.

Secondly: another principle is equally clear: we ought not, without absolute necessity, to let ourselves embrace the alternative of holding a devise void for uncertainty. Where it is possible to give a meaning, we should give it, that the will of the testator may be operative; and where two or more meanings are presented for consideration, we must be well assured that there is no sort of argument in favour of one view rather than another, before we reject the whole. It is true the heir at law shall only be disinherited by clear intention; but if there be ever so little reason in favour of one construction of a devise rather than any other, we are at least sure that this is nearer the intention of the testator than that the whole should be void, and the heir let in. The cases where Courts have refused to give a devise any effect, on the ground of uncertainty, are those where it was quite impossible to say what was intended, or where no intention at all had been expressed, rather than cases where several meanings were suggested, and seemed equally entitled to the preference. Thus in the case of a devise to "one of *J. S.*'s daughters," he having several daughters (*a*), or a devise to "my son *John* (*b*)," where

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(*a*) Sir T. Raym. 82.

(*b*) 5 Rep. 68 b.

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there were two of that name ; in neither case was there anything supposed to indicate which son or daughter was intended. When Lord *Coke* puts the case of a devise to one for life, remainder to the next heir male of *B.* in tail, *B.* having two daughters, and each of them a son, and both *B.* and the daughters being dead, he gives three opinions (*c*) : the one that the devise is void for uncertainty, seems plainly to be the opinion he himself least leans to. And the decision in *Periman v. Pierce* (*d*) would seem to show that "next heir male of *B.*" would have been held to mean the son of the eldest daughter, as next in consanguinity to *B.* ; at any rate the devise in that case seems much more uncertain than in the present, and yet the Court seized on any circumstance rather than be driven to regard the whole as void ; for the limitation of an estate to two of the four daughters, the second and third, was the ground relied on, beside the word "next ;" and this ground only excluded those two daughters, and not the fourth. The case of *Counden v. Clarke* (*e*) was that of a devise to the right heirs of the testator's "name and posterity, part and part alike," which was plainly not only uncertain but self-repugnant ; so a devise to the best men of the White Towers (*f*), or to 20 of the poorest of the testator's kindred, which was *Webb's* case (*g*). In *Doe v. Joinville* (*h*), the remainder being given by the testator, one moiety to his wife's family, and the other to his brother and sister's family (not brother's and sister's family), the testator having one brother with children, one sister with children, and a deceased sister who had left a family ; and there being no

(*c*) Co. Litt. 25 b.(*d*) Palmer, 11. 303.(*e*) Hob. 32.(*f*) Year Book, 49 Ed. 3.(*g*) Roll. Ab. 609.(*h*) 3 East, 172.

means afforded by the will of ascertaining which sister was meant, or what relations of his wife, or whether it was the brother or his family who were to share with one or more of the sisters' families, the Court, of necessity, held this void for uncertainty; but even in that case (and it shows how slow the most celebrated, and justly celebrated, Judges are to come to that conclusion, even in such a case as that), even in that case Lord *Kenyon*, before whom it was argued, though the decision was after his death, had been so unwilling to adopt this conclusion, that, in order to escape from it, he had propounded a theory, in which the other Judges did not concur.

On this head it may further be observed, that the difficulty of arriving at a conclusion, even the grave doubt which may hang round it, certainly the diversity and the conflict of opinions respecting it, and the circumstance of different persons having attached different meanings to the same words, form no ground whatever of holding a devise void for uncertainty. The difficulty must be so great that it amounts to an impossibility, the doubt so grave that there is not even an inclination of the scales one way, before we are entitled to adopt the conclusion. Nor have we any right to regard the discrepancy of opinions as any evidence of the uncertainty, while there remains any reasonable ground of preferring one solution to all the rest. The books are full of cases where every shift, if I may so speak, has been resorted to, rather than hold the gift void for uncertainty; and on any one of the grounds which have been held sufficient to show uncertainty in the few cases, and they are very few, where this has been allowed to defeat a devise, it does not appear possible to defeat the devise now under consideration.

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their technical sense as we are compelled to consider the circumstances and the context. This principle is getting as near the technical sense as is possible, as is strongly illustrated by what *Littleton* (i) says of the performance *cy pres* of conditions which are not in fact known in the law, as to reinféoff the husband and his wife, *habendum* to them and the heirs of their bodies, remainder to the right heirs of the husband and the husband dies. Here the feoffment is made as near to the technical import of the condition as may be. Therefore a life estate without impeachment of waste must be given to the wife, with remainder to the heirs of the body of the husband, remainder to his right heir; which is not an estate tail, as she would have had if he had been alive, but as near it as possible.

We are now to apply these principles, each of course depending upon the particular circumstances of each case; and the two questions which must be disposed of are, first, whether the words "male heir" are used in a strict and technical or a popular sense? And, secondly, on what branch of the family and to whom the words "first male heir of the family" give the right?

be denied; but according to the principles already stated, the proof of this is upon those who would divert or pervert the words from their known legal acceptation, and assume a testator to have treated as an heir one who, his ancestor being still *in esse*, could not, in any legal propriety of speech, be said to have become an heir; the maxim "*nemo est hæres viventis*" being the known general rule. Sometimes, no doubt, the expression is so used as to take it clearly out of the rule: thus "heir apparent" at once shows what is meant. So the Statute of Treasons (25 *Edw.* 3) mentions the King's "son and heir" as contra-distinguished from the King himself. But so too the context may show in a devise that the person intended to take is not very heir, but he who would be heir on the death of his ancestor, and that "heir" is a word of designation or description; as, for example, when he is plainly intended to take during the ancestor's life: thus, though a devise to *A.* for life, remainder to the right heir of *B.*, is contingent during the life of *B.*, and defeated by *B.* not dying during the subsistence of the particular estate, yet if it were to *A.* for life, remainder to the heirs of the body of *B.* so long as *B.* shall live, an estate *pour autre vie* being given, and the ancestor being *cestui que vie*, the rule of law would plainly be excluded. But we may safely assert, that whenever the popular sense of descendant has been given to the word "heir," this has been done on a manifest indication of the testator's meaning, or what *Hobart* (in *Counden v. Clarke*) calls "demonstration plain (*k*)," in a note mentioned with approval by Lord Chief Justice *Bridgman*, in *Collingwood v. Pace* (*l*); an indication which made it almost as

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: (*k*) Hob. 32. (*l*) *Bridgman's Report*, edit. by Bannister, 413.

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issue, over; which, whatever construction we may put upon the devise as to the estate given, clearly indicates his having in contemplation *John Chilcott*, his cousin, and the part or branch to which he belonged of the family. Then he refers to that family by the name of the "*Chilcott family*," in directing that the freehold land thus given to *John Chilcott* shall not be sold or mortgaged, but remain in the family. Immediately after this he provides for the case of *John Chilcott* having no "male heir,"—he, *John Chilcott*, having a daughter then living,—and in that event gives the remainder to "the first male heir of the branch of his uncle *Richard Chilcott's family*."

It appears thus sufficiently plain that he had in view the *Chilcott family* as divided into three branches: first, his own, the eldest, the extinction of which he assumes, only giving life estates to those connected with it by affinity; secondly, the branch of his eldest uncle, the next brother of his father, and to them he gives the estate; whether in remainder to his male heir as a purchaser or not, may be made a question, but a question which for our present purpose is unnecessary to be considered; and lastly, the third branch of the family, that issuing from *Richard*, his father's youngest brother; and to this third branch he gives the remainder expectant upon the failure of male heirs of the second.

The words considered to be inaccurate, and supposed to cast doubt upon the meaning, are these: "the branch of *Richard Chilcott's family*." But I can hardly so regard them, for he was clearly dealing with this third branch as contra-distinguished from the second, that of *John*, and he terms *Richard Chilcott's family* this third branch. The *Chilcott family* is considered as the whole, and to consist of three

excluded by an annuity given to him, the House of Lords again held, against the opinion of the Chief Justice and the Chief Baron and other Judges, that the heir apparent took ; but this was so held upon the intention appearing from the reference made to the sons of *Elizabeth Long* and to herself at the same time, as well as upon the exclusion of the heir at law.

In like manner the case of *Goodtitle v. White* (p), though it goes further than any other case, yet was rested upon the plain indication of intention. The testator gave annuities to three of his daughters for their several lives, and he then gave an annuity to his daughter *Margaret* and his son *Richard Brooking* for his own and their joint lives. Mr. Justice *Blackstone* considered this change in the tenure of the annuity from that of the annuities to the other daughters as a plain indication that the testator contemplated *Margaret* surviving *Richard Brooking*, and that therefore "heir" must be read "issue," in order to let her son take during her life. The devise was to *Richard Brooking* and the heirs of *Margaret*, *habendum* to the heirs male of *Richard* lawfully begotten, and heirs of *Margaret* jointly and equally ; and for want of heirs male of *Richard Brooking* at his decease, then to the heirs and assigns of *Margaret* lawfully begotten of her body. It cannot therefore be said, that any new law was introduced by this case ; and indeed the Chief Justice founds himself upon the former cases, in holding that *Margaret's* heir apparent was indicated to be intended by the testator.

It must, however, be admitted that in both the latter cases *Darbison v. Beaumont*, and *Goodright v. White*, feebler indications of intention were allowed to

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question turned on the want of a particular estate to support a contingent use, the first gift being to the heirs of *William Horn* begotten or to be begotten upon *Ann* his wife, it was held, that neither in a deed nor in a will could any such estate be raised by implication as was here wanted to support the remainder; and the decision was affirmed in the House of Lords.

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But to show an intention of the testator in the present case, there is absolutely nothing except a suggestion of consequences which may or may not ever have occurred to himself. The learned Judges, six in number, who held that he used the words in their popular sense, as meaning heir apparent, do not by any means ground this opinion upon the same circumstances. The Lord Chief Justice gives as his reason what would be quite sufficient, and would bring the case within the authorities of *James v. Richardson* and *Burchett v. Durdant*, if it existed in the facts. His Lordship, both in the former and the more recent argument, but more peculiarly in the former (and to his reasons on that former occasion (*s*) he expressly refers upon this point in his latter argument (*t*),) mainly relies upon the supposed circumstance of the will showing “that the testator contemplated the possibility of the mother being alive when her son took as heir of the uncle.” This, his Lordship says, brings the case within the principle established in *Darbison v. Beaumont* and the other cases. Now I have in vain endeavoured to find any proof that the testator had any such fact in his contemplation as the mother surviving the son who should take. His Lordship can only show this by referring to the obligation imposed on the heir of paying 100*l.* to the

(*s*) 10 Bingh. 234.

(*t*) *Supra*, p. 674.

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to the family of *A. B.* was held to be a remainder to the heir of *A. B.*, and other similar cases. But there is this difference between such devises, and devises to the heir male, or to the issue male, or to the first and other sons,—that all of these must be taken in their technical sense, unless a plain intention appears from the context that they should be taken in their popular sense; whereas it is the reverse with a term like “family,” which only receives a technical sense when the context appears to exclude the popular use of the word.

In the present case, “heir male of the family of *Richard Chilcott*” cannot be taken to mean heir male of *Richard Chilcott*, because, until all the five daughters, save one, were extinct without issue, no person could come *in esse* answering the description; and then this would be wholly inconsistent with the gift of 100*l.* to each of *Richard Chilcott*’s daughters, with the payment of which the devisee in remainder is charged immediately upon the estate vesting in possession. Indeed, if it were heir male of *Richard Chilcott*, it must be heir male of the body of *Richard Chilcott*, by the doctrine laid down in *Lord Ossulston’s Case* (v); and the testator could not possibly intend that, because at the date of the will he knew that *Richard Chilcott* had been long dead, leaving only five daughters.

The same consideration makes it equally impossible to read the devise as of a remainder to one in the strict technical sense of “heir,” any more than of male heir, which it could not be, because that strictly means one claiming altogether through males, and *Richard Chilcott* had predeceased the date of making

(v) 3 Salk. 336; Co. Litt. 27 a; 11 Mod. 189.

thing, assuming gratuitously that which decides the question.

The test by which to try the argument is this:— Suppose the testator had intended to designate the very line and the very individual upon whom the strict technical construction, as I conceive, makes the gift fall. Nay, suppose he had said in terms, “let whichever daughter first dies leaving a male heir be the *stirps* of the line in which this remainder shall descend,” might he not still have added the obligation on that male heir to pay 100 *l.* to each surviving daughter upon the estate vesting in possession? Unquestionably he might have done so, and in the very words which he has used. Therefore those words of undisputed meaning do not at all indicate an intention inconsistent with the technical construction of the words of which the sense is disputed. But the same test applied to the other constructions, which have been set aside upon the inference drawn from the gift of 100 *l.*, will be found conclusive as to those other constructions. For example, had he intended all the daughters or their descendants to make up one heir, and that the remainder should fall upon the one male heir of *Richard Chilcott* through the coparceners, the direction that this male heir should pay 100 *l.* to the surviving daughters would have been absurd, as they must by the supposition have been all dead.

I ought to add, that two of the learned Judges, Mr. Justice *Taunton* and Mr. Justice *Bosanquet*, in a single sentence each, in passing, and among many other reasons, advert to that view of the case, as it seems to me, from an oversight on the part of those learned Judges (*u*); but they do not rely upon it. It

(*u*) *Supra*, pp. 617–18–19, and 626.

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is not the ground of their argument; it is only one of several circumstances to which each of those two learned Judges adverts as forming all together the ground of their argument; but the Chief Justice mainly relies upon it. The ground upon which mainly four of the other learned Judges reject the technical sense exists in the case, but it does not appear to me sufficient to support their conclusion; and the fifth, Mr. Justice *Williams*, in his very able argument, does not specify the particular reasons which have led him to the same conclusion, but merely gives his opinion upon the particular case, after laying down the principles with great clearness and in a manner not to be questioned. The other four learned Judges, Mr. Justice *Taunton*, Mr. Justice *Bosanquet*, and Mr. Justice *Patteson*, and Mr. Baron *Bayley* (subject to the observation I have made respecting the first two of those learned Judges), in their learned and luminous judgments, rest their preference of the popular to the technical sense mainly upon the consideration, that if the strict legal sense is adopted the whole devise may fail, including the gift to the daughters, because it was possible that the whole five daughters of *Richard Chilcott* might survive the determination of the prior life estates given to his widow and her sisters.

This possibility was not a very proximate one; it was more likely that some one of the five should predecease. Three of them died before the life estates determined, and each left a male heir at her decease. But it certainly might have been otherwise, and all might have survived the widow and her two sisters; and in that case, no doubt, the heir at law must have taken, because there would have been no heir male of three living daughters to take under the devise, con-

strued, as we have construed it, by the strict rules of law, and the contingent use would have been destroyed. But the same thing might have happened and the same failure of the devise, upon the other construction, if the sons had died leaving only daughters, or heirs female of the five sisters at the determination of the life estates. Such things are always possible, and in hardly any instance does the frame of a will provide against the possibility of their happening. The existence of such a risk is never to be taken as a proof of a testator's meaning, as a "demonstration plain" that he uses known legal phrases in an unusual and untechnical sense, unless the risk is imminent, and the event one which he must be presumed to have been aware of,—to have had before his eyes and meant to avoid, and yet to have taken no precautions to avoid except the use of the words in question.

If we can be sure that he foresaw the event, that he was minded it should not happen, and that he used the words notwithstanding, then an inference certainly arises that he used them in such a sense as precluded the danger. But if it be only a possibility which we can speculate upon and imagine, while he may very possibly never have thought of it, no inference can arise which it would be safe to rely upon in construing his words. It constantly happens that cases occur never contemplated, and nothing can be more common than to see the legal construction of a devise defeat what must have been the intention of the testator. It appears, therefore, impossible to depart from the known and fixed rule of law in this case upon any of the grounds suggested, and we are then left to inquire, within the scope of that rule,

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who the first male heir of *Richard Chilcott's* branch shall be?—that is, which of the heirs male of the daughters, taking on the decease of their ancestors, became entitled in *July* 1820, when the life estates given by the will were determined.

This brings us to the second and the only remaining point in the case. Taking into consideration what was before shown respecting the meaning to be fixed upon the words “branch of *Richard Chilcott's* family,” and keeping in mind that the testator had disposed of the other and elder branch by giving an estate to the male heir of *John Chilcott*, and for want of such male heir then over to *Richard Chilcott's* branch, it appears that, upon the supposition shown to be necessary, of “heir” meaning heir in the legal sense, the remainder over is devised to the person in *Richard Chilcott's* branch who first shall answer the description by becoming a male heir. There were five daughters living, to the testator's knowledge, of whom four had sons; but the eldest having only daughters, and it being possible a male might be born to her, though this was in all likelihood out of the testator's contemplation, as she had attained the age of forty-seven or forty-eight, but it being certainly possible that her daughters might have sons, as actually did happen before the determination of the life estates, he directs that whoever, from any of the five daughters, first answers the description of heir male, shall be entitled as what he calls “the heir male of *Richard Chilcott's* branch.” The words plainly bear this construction; they indeed seem not to bear any other without doing violence to their obvious meaning; and when we find a sense in which they can consistently with the rest of the will be

taken, and that sense is not only contrary to no rule of the law, but more accords with its known rules and principles than any other sense which can be put upon them, surely we are not authorized to reject it.

This construction, indeed the construction put upon "male heir" of itself, excludes the lines of three of the daughters; and this construction excludes a fourth. The issue of *Agnes*, who was still living when the ejectments were brought, are of course excluded. The *Winters* are also excluded, because *Joan* their mother survived the last tenant for life, *Elinor White*, by some months. *Joseph Parsons* answered the description of a male heir at *Elinor White's* death, because his mother *Sarah* died in 1813; but he cannot be considered as coming under the description of first male heir on any construction that can be imposed upon the phrase, for he neither was the male heir of the eldest daughter, nor the person who first, by the death of his mother, came within the description of heir. The construction excludes, lastly, the *Perratts*, because *Betty Perratt*, daughter of *Richard Chilcott's* eldest daughter *Mary Bishop*, was living when the ejectments were brought, and consequently the Defendant, *M. Perratt*, did not come within the description of heir. Thus the line of *Betty Viney* remains to take. She died in 1804, leaving a son *Thomas*; consequently that son was then male heir, and he was the first of *Richard Chilcott's* family, the first of that branch of the *Chilcott* family, who became male heir. He devised to his wife *Catherine*, one of the lessors of the plaintiff in the second ejectment; and some question having been made whether the words give a remainder in fee or in tail, it is necessary to dispose of this in order to remove

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any doubt as to the validity of the devise under which she claims; but I own I can see no doubt whatever on this part of the case, nor indeed do I find any expressed by the learned Judges. It is not denied that an estate may be given to *A.* for life, and the heirs of the body of his ancestor *B.*, so as to execute an estate tail in whatever person comes within that description by being heir of *B.*; and consequently that if *A.* himself comes within it, the estate tail shall be executed in him; as if the gift be to the first son of *B.* and the heirs of his body; and such was the principle in *Mandeville's Case*, stated in *Coke Littleton* (*x*), and in *Southcote v. Stowell* (*y*). But in all such instances there are apt words expressly to create an estate tail by plain limitation; and to raise an estate tail from such words as "first heir," and still more from "the first heir," is quite impossible. It is clear, then, that the person, whoever he may be, taking under this devise takes an estate in fee, and therefore *Thomas Viney* could well devise to his wife *Catherine*.

The remainder having once vested in the son of the fourth daughter, it cannot divest by any subsequent event. This is not one of the cases in which a remainder may open to let in interests accruing since the vester; as, where a contingent limitation is to the use of several, incapable of taking at one and the same time, it will vest in the first who becomes capable, and then open so as to let in the others for their proportions. But here the remainder being contingent till the death of *Betty Viney*, it vested upon her death in her son, who took as a purchaser; and the rule is, as was laid down in *Southcote v. Stowell*, "that a remainder being once well vested

(*x*) Co. Litt. 20 b. 26 b.

(*y*) 1 Mod. 226.

in a purchaser, the estate shall afterwards run in course of descent."

That the construction put upon this devise is free from all doubt, nay, that there may not be considerable objections urged against it, can in no wise be affirmed. The case is confessedly one of extraordinary difficulty; but the meaning given to the words appears to come within the principles already stated, and to be less exposed to grave objections than any of the other constructions which have been proposed.

Thus, if it be said that, after all, the son of the fourth daughter is not so much first heir of the branch as the son of the eldest; the answer is, first, that the latter is not heir unless we violate a known rule of law; and, secondly, that neither is the heir of the branch, for no one can answer that description except an heir made up of all the coparceners.

Again, if it be said that neither, therefore, is the son of the fourth daughter such heir; the answer is, that such heir, strictly so called, being plainly excluded by the words of the devise, we come as near the strict legal sense as the will allows, by taking one who is both an heir, and, in a plain sense, the first heir, though he be not that one heir which all the coparceners together make up.

Again, if it be said that the son of the younger daughter only is the male heir of the branch, meaning by that the male heir in the branch at the time of his mother's death, and that afterwards, an elder sister dying, her son would have better answered the description; the answer is, that there is no good ground for holding the son of the elder preferable to the son of the younger daughter as male heir of the branch, because the law regards the daughters equally;

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and the remainder being once vested in the heir male by the fourth daughter, it cannot be divested by any subsequent event.

Further, if it be said that the testator more probably intended the male heir of the eldest daughter to take; the answer is, first, that this opens the whole question upon the legal import of the words he has used; but next, that if we are to go in quest of probable intention, we see he most probably intended a male heir (or rather, if his attention had been called to it, would have intended a male heir) of none of the five daughters of *Richard Chilcott* to take, but rather a male heir of *John Chilcott*, the elder branch; and yet he is held clearly, on all hands, to have used words which preclude any such effect being given to his most probable intention. And, lastly, it is certain that he might have distinguished the eldest daughter and her issue, had such been his clear intention; but he did not.

In construing the words "the first male heir," &c. I have proceeded upon the ground of "male heir" being taken as near the technical sense as is possible, consistent with the words of the will. If, instead of this sense, we take the term to mean descendant or heir apparent, much greater doubt arises as to the person intended by "the first;" so much doubt that I should in this case even lean more towards the opinion of those who hold the meaning to be uncertain. But this consequence of giving a popular sense to the word "heir," the consequence that we should be driven to hold the devise void for uncertainty, only adds new force to the reasons in favour of abiding by its legal acceptance. Nor is it easy, in construing the devise over, to leave out of our consideration the

reasons given by Mr. Justice *Holroyd*, in his most able and learned argument (z), for holding that the testator used the language in the first gift, that to *John Chilcott*, in nearly the same sense (or at least that he must be taken to have used it in the same sense) which we are affixing to the terms employed in the devise over to *Richard Chilcott's* family.

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If your Lordships shall, as I humbly venture to recommend, adopt this construction, and agree with the Court of King's Bench, you will differ from the two learned Judges who consider that the grandson of the eldest daughter should take as nearest in blood (but there is no indication to whom nearest); from the two learned Judges who hold that the second daughter's son should take as first in order of birth; and from the other two who hold the whole devise void for uncertainty. You will agree with the five learned Judges who, rejecting the popular sense of the words, construe them technically, and give the remainder to the first person who answers, or comes as near as may be to answering, the legal description of the will.

In any case not before you for review, which should have had the authority of such names as are to be found supporting any one of the doctrines mooted in this argument, that authority would have been high and commanding. Where we are called upon to determine whether or not those most learned and able persons have in the Courts below arrived at a right conclusion on a question confessedly difficult, we are not at liberty to acknowledge the sway of their authority; yet it may be some satisfaction to your

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Lordships, when driven to the necessity of choosing between their conflicting opinions, that you have taken the same view with such men as *Holroyd* and *Littledale*, among the greatest lights that have ever shone in our profession.

Lord *Cottenham*:—The judgment under consideration is in favour of the title of *Thomas Viney*, the son of the fourth daughter of *Richard Chilcott*, the testator's uncle. The first question is, whether this judgment should be reversed? Till this is determined, it would be useless to consider which of the other male descendants of the daughter of *Richard Chilcott* ought to be preferred as best answering the description of "first male heir of the branch of my uncle *Richard Chilcott*'s family."

Thomas Viney, if the ground upon which he has been preferred by the Court of King's Bench cannot be maintained, could not, upon any other, sustain any competition with the male descendants of the elder sisters, *Mary* or *Joan*, for he was neither first in birth nor *proximus gradu*, but he was the first of the male descendants of *Richard*'s daughters who, by the death of his mother, became her heir in the sense implied in the maxim "*nemo est hæres viventis*." The sole question, therefore, is whether this maxim applies to the present case, so as to give to *Thomas Viney* a title above the other claimants? In the Court of King's Bench, in 1826, two Judges, Mr. Justice *Littledale* and Mr. Justice *Holroyd*, were in favour of his claim; and one, Mr. Justice *Bayley*, against it. In this House, in 1833, four Judges, Mr. Justice *Taunton*, Mr. Justice *Bosanquet*, Mr. Justice *Bayley*, and Lord Chief Justice *Tindal*, were

against it; and one, Mr. Justice *Littledale*, was in its favour: and upon the re-argument, in 1842, three Mr. Justice *Coltman*, Mr. Justice *Maule*, and Mr. Baron *Parke*, were in its favour; and three, Mr. Justice *Williams*, Mr. Justice *Patteson*, and Lord Chief Justice *Tindal*, were against it. The result of all the opinions delivered is, that six, Mr. Justice *Bayley*, Mr. Justice *Williams*, Mr. Justice *Taunton*, Mr. Justice *Bosanquet*, Lord Chief Justice *Tindal*, and Mr. Justice *Patteson*, are against his title; and five, Mr. Justice *Littledale*, Mr. Justice *Holroyd*, Mr. Justice *Coltman*, Mr. Justice *Maule*, and Mr. Baron *Parke*, are in favour of it. It is impossible that authority can be more equally divided; the majority, however, is against the title of *Thomas Viney*. The difficulty of the case, evidenced by this great equality of opinion amongst the Judges, seems to demand the utmost caution and deliberation on the part of this House. After the most careful consideration of the grounds upon which these several opinions are founded, I have come to the same conclusion as the majority of the Judges.

It is a proposition common to all the claims except those of the heir at law, that the party to take under the description of "first male heir of the branch of my uncle *Richard's* family" must be some person who could not answer the legal definition of "heir." The testator knew that his uncle *Richard* had left only daughters; from some of them, therefore, the party to take must be descended; but any such party must claim through some one of those daughters; and as the five daughters of *Richard* constituted but one heir, and as they were all married and had children, the testator could not have contemplated the

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entire heirship of his uncle *Richard's* branch of the family being vested in any one descendant of his daughters. If, therefore, any of the descendants are to take, as none of them can answer the description if construed in the strict legal sense, the terms used must be construed in a popular sense; and if so, the question is, what is the ordinary and popular sense of "first male heir of a family, or of a branch of a family?"

The familiar expressions, "heir to the throne," "heir to a title or estate," "heir apparent," "heir presumptive," prove that the existence of a parent is quite consistent with the popular idea of heirship in the child. In all such cases the legal maxim "*nemo est hæres viventis*" has no place, nor can it in any in which the person speaking knows of the existence of the parent, and intends that the devise to the child should take effect during the life of the parent. In this case the testator by his will proved that he knew of the existence of the parent, and I think it appears clear that he intended the devise to take effect during the life of the parent. This rule is supported as well by authority as by common sense. In *Darbison v. Beaumont* (a), a devise in remainder to the heir male of the body of *E. L.* was held to vest in her eldest son, the will showing that the testator knew that *E. L.* was living and had a son. In *Brooking v. White* (b), a devise to the heir of testator's daughter, to whom he gave a term and an annuity, was held good for the daughter's son, because the will proved that the testator knew that the mother was living. In *Farrington v. Darel* (c), the devise after an estate was to

(a) 1 P. Wms. 229; 3 Bro. P. C. 60. (b) 2 W. Blacks. 1010.
 (c) Year Books, 9 Hen. 6, p. 23, and 11 Hen. 6, p. 12.

testator's next heir male. The contest was between the testator's grand-daughter, who was heir, and her son, and no objection was made to his claim because his mother was living. It is admitted that the rule "*nemo est hæres viventis*" is not inflexible, and that an heir apparent may take under the description of "heir," if such appear to be the sense in which the testator used the term.

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It has been said that these cases depart from the old rule of law ; but the observation is founded upon the supposition that the wills in those cases did not afford sufficient evidence or demonstration that the testator used the expression in any other than the legal and technical sense. It is not disputed that an heir apparent may take under the term "heir," if the intention be sufficiently clear ; or that the child of a living parent may take under the description of "heir," the heirship being derived through such parent. It would appear that the question to be asked would be, "did the testator use the word 'heir' in the strict legal sense, or in any other sense?" and that if the answer should be, that he used the term, not in the legal and technical, but in some popular sense, that the rule so adopted should be followed out. It does not seem reasonable to adopt the strict legal sense as to part, and the popular sense as to another part, of the description ; and that this need not and ought not to be done, if contrary to the apparent intention of the testator, and leading to consequences inconsistent with his declared object, the cases before mentioned and the other authorities referred to by the learned Judges clearly establish.

The cases above referred to, and the observations connected with them, would apply to this case if the testator had described the parties to take as heirs of

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their respective mothers; but that appears to me to introduce a difficulty which does not belong to the case. The heir of which the testator was in search was an heir to the family or branch of his uncle *Richard*. He must indeed have known that such heirship could only be derived through some one of the daughters of *Richard*, but to these daughters he in the devise of his land had no regard; they are not named in the description of the devise. The Judges who have thought that the maxim of "*nemo est hæres viventis*" applies, seem to have considered the devise as if it had been to "such person of the branch of my uncle *Richard*'s family who shall be an heir male," making the being an heir male to somebody a necessary qualification; but the expression is, "the male heir of a branch or family," and not of any particular individual. I can see no reason for departing from the obvious meaning of the words, and for the purpose of introducing a qualification which would be foreign to the apparent intention of the testator, and which might exclude those for whom he must have intended that the devise should operate.

If, then, the terms used are capable of describing the child of a living parent, the question is, what appears to have been the testator's intention? He knew that his uncle *Richard* had five daughters, and that three or four of those daughters had sons, but that the eldest daughter *Mary* had only daughters. Had he intended at all events to prefer any of the living grandsons of his uncle *Richard*, he would of course have done so in terms; but it is evident that he had some intention of preference to depend upon some future event, and which he describes by the words "first male heir of the branch of my uncle *Richard Chilcott*'s family." These words must mean the first

male heir of that branch of the family of *Chilcott* which comes from my uncle *Richard*, which means the same as "first heir male" or "male descendant of my uncle *Richard*." Suppose that these had been the terms of the devise, questions would certainly have arisen as to the meaning of the term "first:" but I cannot conceive that it would have been held that no male descendant of *Richard* could take whose mother was alive. In the case supposed, as in the present, the testator does not refer the heirship of the male to take to the mother, but to his uncle *Richard*, or to his branch of the family. Whatever meaning might be attributed to the word "first," the party to take must have stood in the same position with respect to the testator's uncle *Richard*, whether his mother was living or dead. The mother was not to take any interest in the estate. How then could her being alive or dead have, in the view of the testator, any influence upon his wishes and the succession of her son? It might indeed have happened that the party to take would not be heir to his mother, as if the mother had left a grand-daughter by a son, and a grandson by a daughter. In the absence of preferable claims, the testator must have intended that the grandson should take as first male heir of *Richard's* family; but the grand-daughter would be heir to the mother; and yet, according to the decision, his title would be defeated by his mother being alive, although by her death he would not be more her heir than he was before, and would in either case be equally heir of the branch. The provision in the will that the heir male to take should, upon taking possession, pay 100*l.* to each of such of the daughters of *Richard Chilcott* as should be then living, although, perhaps,

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not so conclusive as has been supposed by some of the learned Judges, appears to me strongly to prove that the title of the party to take was not to depend upon the previous death of his mother.

The period at which the heir male was to take possession was the death of the testator's widow, if she did not exercise the power, or the death of the survivor of *Elinor* and *Ann White*, if she did; and every daughter of *Richard Chilcott* then living was to have 100 *l.* There is no exclusion of the mother of the party taking. It is true that she is not necessarily included, if others were living; but suppose all the daughters but one had died without leaving any male descendant, and that the sole surviving daughter had a son, according to the decision that daughter would not be entitled to the 100 *l.*; and this leads to the consideration of how likely the construction adopted would be to defeat the devise altogether. At the time of the testator's death the mothers of all the male descendants of *Richard* were living, and the remainder was to vest upon the expiration of one, or at most of three, life estates. If the mothers had all continued to live until the expiration of these life estates, the whole devise, according to the decision, would have failed. This the testator could not possibly have intended; and this absurd consequence would not have followed from anything the testator has said, but from applying a merely technical maxim, of which the testator probably had never heard, to the construction of the terms he has used, which it is admitted can only be made intelligible by construing them in their popular sense, and to which, therefore, the rule of construction is to be applied.

Many instances might be suggested of consequences

following from the construction adopted which the testator could not possibly have contemplated. By the expression "first male heir of the family" he must have intended to describe some rational ground of preference, such as first in birth, that is, in personal seniority, or first as being descended from an elder branch, and therefore first in the seniority of his family; but according to the decision he meant such one of the sons of the daughters of *Richard* whose mother should first die,—a circumstance which must have been wholly immaterial to any object or intention of the testator. If two daughters had died, each leaving a son, and the youngest daughter had died first, her son would have taken as first male heir of the branch of *Richard's* family, although he might be an infant, and the son of the elder sister had been born many years before him, and was therefore first in personal seniority and in the seniority of his line. It is impossible that the testator could have intended that the title of his devisee should depend upon the chance of an event so utterly immaterial.

It appears to me, in the first place, that it is contrary to principle, after holding that the terms used must be construed according to the popular sense and not according to the technical meaning, to depart from that rule, and to restrain a popular expression within a rule of law purely technical; secondly, that in the present case there is sufficient upon the face of the will to prove that the testator did not use the terms according to their technical meaning, but in a popular sense,—the heir of a line, branch, or family, and not of any individual, and that there are provisions sufficient to include the heir of a living parent; and, thirdly, that the adoption of the technical meaning

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of the term "heir" as the ground of construction, might, upon many suppositions, have led to consequences which the testator could not have intended, and, on some, have defeated the devise altogether. It consequently appears to me that the judgment of the Court of King's Bench, which has adopted this principle, is erroneous, and ought to be reversed.

Feb. 28.

Lord *Brougham* :—In this case, upon the grounds which I have stated upon a former occasion, and upon which we are all agreed (whatever difference there may be upon the other objections), namely, that in this case the lessor of the plaintiff had no right to recover, the judgment below being that the lessor of the plaintiff was not entitled, I have humbly to move your Lordships that the judgment of the Court below be affirmed; that is to say, that your Lordships should give judgment for the Defendants in Error.

Lord *Cottenham* :—I quite concur in the opinion which my noble and learned friend has expressed, that the lessor of the plaintiff, *Winter*, has no title. When the case was before your Lordships last *August*, I considered this case very fully; and I think it right to state how it happened that on that occasion I was led into a discussion upon a question which, when the record came to be looked at, appeared to be not before the House: it appears that the only record before the House is an ejectment brought upon the demise of *Winter*. Certainly there was an idea in the House that the record in the case of *Viney* had also been brought up from the Court of King's Bench. That appears not to be the case, and there-

fore the only question for the consideration of the House is upon the title as it was claimed by the lessor of the plaintiff, *Winter*; and looking at that part of the case, and that part of the case only, which alone is necessary to be considered for the purpose of giving judgment upon the ejectment actually before us, I am of opinion that the lessor of the plaintiff has not made out his title.

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It was then ordered and adjudged, that “the judgment in the Court of King’s Bench, in the case of *Doe dem. Winter v. Perratt & Burge*, be affirmed (f).”

(f) To prevent any mistake as to the effect of the above order, it is proper to observe, that it does not affirm or reverse, or in any way affect the judgment of the Court of King’s Bench in favour of Mr. *Viney*, as devisee of *Thomas Viney*, the son of *Richard Chilcott*’s fourth daughter. There being no writ of error on that judgment, the House could not make any order on it, although it was involved in the arguments in the questions put to the Judges, and made part of the subject of their opinions and of the consideration of the House.—See the head notes, p. 606 *supra*.

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March 2.

HENRY SIREE - - - - - *Appellant.*

MARY ANNE KIRWAN, Widow - *Respondent.*

*Sale of Lands
subject
to Annuity.
Agreement
or Fraud.
Immaterial
Inquiries.
Costs.*

W. C. being seised in fee simple of divers parcels of lands and other hereditaments, all subject to an annuity for the life of his mother and to a portion for his brother, mortgaged one parcel and sold others. Under a decree afterwards made against *W. C.* for raising the portion, several parcels of the then unsold lands, including the mortgaged premises, were sold in the Master's office, subject to the annuity, but the deeds of conveyance to the purchasers did not state whether exclusively subject thereto or rateably with the parcels that still remained unsold. The mortgagee's representative filed a bill against these purchasers and *W. C.*, for an indemnity for the mortgage out of the unsold lands, free from the annuity, charging that, by agreement between these defendants, the parcels sold in the Master's office were to be exclusively subject thereto, and on that account produced less by the value of the annuity than if they were sold subject thereto rateably with the parcels that still remained unsold. There was no proof in the cause of the alleged agreement.—

HELD, that a decree directing inquiries as to the value of the parcels sold by the Master, was erroneous, as such inquiries were immaterial to the issue between the parties; and that the bill ought to have been dismissed, with costs, without prejudice to any bill that might be afterwards filed for apportioning the annuity on all the lands originally charged therewith.

A Court cannot, without proof, presume an agreement, on the ground that, if there was no agreement, there was fraud; nor will the Court act upon fraud or other misconduct, if they are not put in issue by the pleadings.

The House, in reversing a decree which directed immaterial inquiries, and ordering the bill to be dismissed, as at the hearing, with costs, will not give the Appellant relief from his costs of prosecuting the inquiries before he appealed.

RICHARD CHARTRES was, in the year 1784, seised in fee of the towns and lands of East and West *Ballygenane*, *Coolsallagh*, *Kilcummer*, and *Peardstown*, also of certain fields in the *Poudladine* Road and south liberties of *Cork*, the impropriate tithes, the two winter fairs and glebe lands of the parish of *Kil-*

worth, and of certain lands in *Duzzy* Island, all in the county of *Cork*; and was also entitled, under a lease of lives renewable for ever, to part of the lands of *Johnstown*, called *Granite-field*, in the county of *Dublin*. By indentures of lease and release, the release bearing date the 25th of *October* 1784, and made between the said *R. Chartres* of the first part, *Thomas Carew* and *Elizabeth* his daughter, of the second part, and certain trustees therein named, of the 3d and 4th parts (being the settlement executed in contemplation of the marriage, which shortly afterwards took place, between the said *Richard* and *Elizabeth*), the said several lands and hereditaments were settled to certain uses therein declared, and, amongst others, to the use and intent that after the decease of the said *Richard*, the said *Elizabeth* should receive for her life, out of the said lands and premises, a jointure of 300 *l.* a year; and subject thereto, to the use of trustees for 200 years, upon trust to raise a sum of 3,000 *l.* for the portion or portions of the younger child or children of the marriage, payable as the said *Richard* should appoint, and in default of appointment, to them equally at the age of 21; and subject to the said term and jointure, to the use of such of the sons of the marriage in tail as *Richard* should appoint, and in default of appointment, to the first and every other son in tail male, with other remainders over; and the reversion was thereby given to the said *Richard* and his heirs absolutely.

There was issue of the marriage, two sons, *William Chartres* the eldest, and *Richard* the second son, and no other issue. Their father died in 1808, intestate, and without having made any appointment of the said lands and premises, leaving his said sons and his wife *Elizabeth Chartres* him surviving; whereupon *William*

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Chartres became entitled, as tenant in tail male, to the said lands and premises, and *Richard* became entitled to the charge of 3,000*l.* on his attaining his age of 21 years, and *Elizabeth Chartres* became entitled to the jointure of 300 *l.* a year for her life, chargeable on all the said lands and premises.

In 1810, *William Chartres* suffered a recovery of all the said lands and premises, and became seised thereof in fee, subject to the jointure and to the charge and term of 200 years to secure the same; and by indenture of mortgage, dated the 1st of *July* 1812, he conveyed the lands of *Peardstown* to one *Nicholas Connolly*, his heirs and assigns, subject to redemption on payment of 780 *l.* with interest at 6*l. per cent. per annum*; and upon the same day he executed his bond and warrant of attorney for confessing judgment thereon, in the penal sum of 1,560 *l.*, as a collateral security for the said 780 *l.* and interest. *Nicholas Connolly* shortly afterwards died intestate, leaving *William Connolly* his eldest son and heir at law, who also obtained administration of the goods and chattels of his father.

In the year 1814, *W. Chartres* sold and conveyed the fee of *Poudladine* Road fields to *W. Connolly*, and in 1815 he sold and conveyed the fee of the lands of *Duzzy Island* to *Robert Hedges Eyre*. Both these conveyances contained stipulations that the lands so respectively conveyed should be discharged from the jointure of 300 *l.* a year, and from the charge of 3,000 *l.*

In *December* 1815, *William Chartres* married *Alicia Vipont*, and a marriage settlement was executed, dated the 23d of *December* 1815, whereby all the said lands (except the parts so sold to *W. Connolly* and *Eyre*) were settled to the use of *W. Chartres* for life, remainder to the sons of the marriage in tail male, remainder to the daughters in tail. The wife died

shortly after the marriage, leaving issue only one daughter, *Alicia* (now the wife of *George Gray*), who, under the provisions of the settlement, became tenant in tail in remainder of the said lands and premises, expectant on the death of her father.

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By an indenture, dated the 17th of *January* 1816, Mrs. *Elizabeth Chartres* granted to one *Anne Cave* an annuity of 100 *l.*, part of her jointure of 300 *l.*; and by another indenture, dated the 26th of *April* 1816, she granted to one *James Durham* an annuity of 100 *l.*, also part of her said jointure.

R. Chartres having in 1816 attained his age of 21 years, and being entitled to the charge of 3,000 *l.*, by certain deeds, executed in the years 1816 and 1817, assigned this charge by way of mortgage to the said *J. Durham*, to secure certain sums of money advanced to him by *Durham*, who by one of these deeds was empowered to call in the said sums immediately.

In *March* 1817, *R. Chartres* and *J. Durham* filed their bill in Chancery, in *Ireland*, against *W. Chartres*, *Elizabeth Chartres*, and others (trustees and formal defendants), stating in substance the matters aforesaid; and thereby prayed, amongst other things, that an account might be taken of the charge of 3,000 *l.*, and that *W. Chartres* or such other defendants as should appear liable thereto, might be obliged to pay *R. Chartres* and *J. Durham* what should appear due on foot thereof, according to their respective rights; or in default of payment, that said lands or a competent part thereof should be sold for payment of the said charge.

The several defendants having put in their answers, the cause came on to be heard before the Lord Chancellor of *Ireland*, in *June* 1818, when his Lordship ordered a reference to the Master to take an account of the sum remaining due on foot of the charge of

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3,000 *l.*, and also accounts of what was due to *Durham* on foot of his several securities, and to *Anne Cave* on foot of her annuity of 100 *l.*, and also to take an account of all incumbrances affecting the said estates prior to the said plaintiffs' demands.

The Master, by his report, made in *January* 1819, and afterwards confirmed, stated, amongst other things, that there was due upon foot of the charge of 3,000 *l.* the sum of 3,000 *l.*, together with 846 *l.* 15*s.* for interest thereon, making together the sum of 3,846 *l.* 15*s.*; and that there was due to *J. Durham* 250 *l.*, being two and a half years of his annuity of 100 *l.* chargeable on the said lands; and that there was also due to him the principal sum of 425 *l.* upon foot of certain deeds in the report mentioned, together with interest thereon, amounting in the whole to 478 *l.* 0*s.* 6*d.*

The cause came on to be heard on the report and merits in *March* 1819, before the Lord Chancellor; whereupon it was ordered and decreed that the said sums of 3,000 *l.* and 846 *l.* 15*s.* should be charged on the trust term in the lands and premises comprised in the deed of *October* 1784, and that *R. Chartres* was entitled to the same, and that *W. Chartres* should, in six months, pay him the said sums, as also his costs in the cause, and that thereupon the plaintiffs should discharge the said several lands and premises from the same; and it was further ordered, that, in default of payment within the time aforesaid, the Master should set up and sell by public cant the trust term in the several lands and premises comprised in the deed of 1784, or so much thereof as would be sufficient to discharge the principal, interest, and costs so decreed to the plaintiff *R. Chartres* as aforesaid; and that out of the monies arising by such

sale, the plaintiff *Durham* should be paid the sum reported due to him on foot of the assignment of part of the said charge, with interest until paid, together with costs.

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W. Chartres not having paid the several sums as directed by the decree, the Master, in pursuance thereof, in *November* 1819, set up the lands of *Granite-field*, in the county of *Dublin*, to be sold, and the same were thereupon sold for 2,000 *l.* to Mr. *Solomor Spear* (who was of counsel for the plaintiffs in the cause). There was no statement made at the sale that those lands were or were not sold subject to the jointure of 300 *l.*

On the 20th and 27th of *April* 1820, further sales were had in the Master's office, in pursuance of the said decree, on which occasions *R. Chartres* (the plaintiff in the cause) was declared the purchaser of the lands of West *Ballygenane*, for a sum of 800 *l.*, and of other denominations of the said lands, for sums amounting in the whole to 2,250 *l.*

W. Connolly, the representative of the mortgagee of the lands of *Peardstown* (not a party to the cause), having afterwards obtained an order to open the two last-mentioned sales, another sale was had in *December* 1820, at which he was present, and *R. Chartres* was again declared the purchaser, at the price of 3,750 *l.*, of the lands of West *Ballygenane* and *Peardstown*, a small division of East *Ballygenane*, and certain parts of *Coolsallagh*, the impropriate tithes, and the two winter fairs and glebe of the parish of *Kilworth*, for the residue of the said term of 200 years; all which were conveyed to him by indenture, dated the 27th of *August* 1821, for the residue of the said term, without any mention being therein made of the liability of those lands, exclusively, to the jointure. The notes of

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sale in the Master's office stated that they were "subject to an annuity of 300 l. a year, for the life of Mrs *E. Chartres*, then aged near 60 years."

Most of these lands and premises so purchased by *R. Chartres*, under the decree in *Chartres v. Chartres* were purchased by him in trust for the Appellant (who was his solicitor in the cause, and his agent in completing the purchase); and accordingly, by an indenture, dated the 21st of *September* 1821, *R. Chartres* assigned and conveyed to the Appellant the lands of *Peardstown*, 78 acres of *East Ballygenane*, and the said tithes, fairs, and glebe lands of *Kilworth*, for valuable consideration; and the Appellant thence became and still is possessed or in receipt of the rents and profits thereof.

In *November* 1821, *W. Connolly*, as eldest son and administrator of *Nicholas Connolly*, filed his bill in the Court of Chancery in *Ireland*, against *W. Chartres*, *Alicia Chartres* (then an infant), *J. Durham*, *R. Chartres*, *Elizabeth Chartres*, *Anne Cave*, and others (trustees and formal defendants), chiefly stating the matters aforesaid, and praying that an account might be taken by the Master of the produce of the sales of the lands and premises sold under the decree in *Chartres v. Chartres*, and also an account of what was due to plaintiff in respect of the said mortgage and judgment; and that, inasmuch as the lands of *Peardstown*, which were the only lands included in the mortgage to the plaintiff's father, had been sold for payment of prior incumbrances under the said decree, it might be referred to the Master to inquire and report whether there were any lands comprised in the settlement of 1784, and on which such prior incumbrances were a lien, yet remaining unsold; and if so, that the plaintiff might be decreed to be a creditor

on such unsold lands, to the extent of the purchase money of the lands of *Peardstown* comprised in the mortgage to his father.

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The Appellant was not made a party to that bill, nor was any relief prayed thereby in respect of the jointure of 300 *l.*, nor was there any allegation in it that any lands in particular were chargeable therewith in exoneration of others, or that all the lands sold as well as unsold were not liable thereto.

The several defendants put in their respective answers to the bill, and *R. Chartres* in his answer thereto, filed in *July* 1822, stated, that he became the purchaser of the tithes, lands and premises in that bill mentioned, subject, in common with the lands remaining unsold, to the jointure of 300 *l.* to his mother.

That cause (*Connolly v. Chartres and Others*) was heard before the Lord Chancellor, on pleadings and proofs, in *February* 1826; and by a decretal order then pronounced, it was referred to the Master to inquire and report in regard to the several matters prayed by the bill.

The Master made his report in *July* 1828, and the cause was afterwards set down to be heard on the report and merits, but becoming defective for want of parties, was struck out of the list by consent, by an order dated the 16th of *February* 1829, and no final decree was then made thereon.

R. Chartres having been discharged as an insolvent debtor in 1827, and one *John M'Key* having been appointed his assignee in 1832, *W. Connolly* then filed a supplemental bill in the cause, praying that *M'Key* might answer the premises. This was the last proceeding taken by *W. Connolly* in the suit; he died in *May* 1835, having by his will appointed

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his only child, *Mary Anne*, the Respondent, his executrix, and certain other persons his executors. The Respondent alone proved the will. She afterwards married one *William Kirwan*, and having obtained letters of administration of the goods and chattels of *N. Connolly*, unadministered by *W. Connolly*, she and her husband, *Kirwan*, in *November 1836*, filed their bill, in the nature of a bill of revivor and supplement in the cause of *Connolly v. Chartres*, against *W. Chartres*, *Alicia Chartres* otherwise *Gray*, and her husband *George Gray*, *Elizabeth Chartres*, *R. Chartres*, *J. Durham*, *Anne Cave*, and the Appellant, who thereby was for the first time made a party to the said cause.

The bill of revivor and supplement, after stating for the most part the several matters aforesaid, further stated that the several purchasers of the lands and premises sold under the decree in the cause of *Chartres v. Chartres*, were well aware at the times of their purchases, that the previous sales of the *Poddladine* Road fields to *W. Connolly*, and of the lands of *Duzzy Island* to *Eyre*, were made upon stipulations that these denominations should be respectively exonerated from the said jointure and charge, and that the same were to be raised out of the other lands comprised in the settlement of 1784; and that previous to the sales under the said decree, it was arranged and agreed by and between *W. Chartres*, *R. Chartres*, and the Appellant, with the knowledge and participation of *S. Spear*, that parts of the lands and premises comprised in the settlement of 1784, and not theretofore sold by *W. Chartres*, sufficient to produce sums to satisfy the purposes of the decree in *Chartres v. Chartres*, should be set up and sold under that decree, subject exclusively to said jointure, so that the sales there-

tofore made of parts of the said lands to *W. Connolly* and *Eyre* should remain unaffected, and so also that such parts of the said lands as might remain unsold under the said decree should be free of and exonerated from all future accruing gales of the said annuity: and accordingly, that the conditions of sale under the decree were for the residue of the trust term of 200 years, subject to an annuity or jointure of 300 *l.* for the life of *Mrs. E. Chartres*, then aged near 60 years, and under and upon such conditions *R. Chartres* was in *December* 1820 declared the purchaser of the said lands and premises so purchased by him: And the bill charged that the parts of said lands so purchased by *R. Chartres* were well worth the sum of 3,750 *l.*, subject exclusively to the thereafter accruing gales of the entire of the said annuity or jointure, and that if sold subject only to a proportionate part thereof, according to the relative value of the said lands and premises so purchased by him, and of the other lands and premises comprised in said settlement of 1784, they would have been worth, and would have produced 2,500 *l.* and upwards more than said sum of 3,750 *l.*; and that the only parts of the said lands and premises which were originally charged with said jointure, which then remained unsold, were a part of *East Ballygenane*, containing 164 acres, producing yearly 95 *l.* 19 *s.* or thereabouts, and a part of *Cool-sallagh* containing 185 acres, producing yearly 103 *l.* 3 *s.* 2 *d.* or thereabouts; and that these parts were not sufficient for full payment of the jointure, and if sold subject thereto, or to any proportion thereof, the same would not produce nearly sufficient for payment of the sum due on foot of the said mortgage and judgment to *N. Connolly*; and that the plaintiff, *Mary Anne*, as administratrix of the goods and chattels of

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N. Connolly, was entitled to the sum due on foot thereof, and to have the lands still remaining unsold set up and sold, discharged of the jointure and all arrears thereof, and to have it declared that the lands so purchased in the cause of *Chartres v. Chartres* by *R. Chartres*, were exclusively liable to make good and pay the said jointure and all arrears thereof; and that the plaintiffs were entitled to have the receiver, who had been appointed in the cause of *Chartres v. Chartres*, extended to their suit. The bill also stated that about three years after the purchase by *R. Chartres*, he and the Appellant filed a bill against *W. Connolly, Eyre*, and others, for an apportionment of the jointure on all the lands comprised in the settlement of 1784; to which the defendants put in answers, insisting thereby that *R. Chartres* had purchased the lands under the decree, subject exclusively to the future full payments of the jointure, to the exoneration of all the other lands comprised in the settlement of 1784; and so conscious were he and the Appellant that such was the fact, that they suffered the bill for apportionment to be dismissed with costs, for want of prosecution.

The bill of revivor and supplement prayed, that the decree of *February* 1826, in the original cause, might be revived, and that the report and proceedings might stand, and that the plaintiffs might have the benefit thereof, and have the same relief as in and by the said original bill was prayed: And that it might be declared, that the lands and premises in the said report mentioned, and thereby reported to remain unsold under the said decree, in the cause in which *R. Chartres* was plaintiff, were freed and exonerated from the said jointure and all arrears thereof, so far as regarded *R. Chartres* and the Appellant; and that

they might be decreed to indemnify the said lands and premises from the said jointure, and all arrears thereof: And that it might be declared that all arrears of the jointure and the accruing gales thereof, ought to be levied out of the lands and premises purchased by *R. Chartres*, under the decree in the said cause, in which he was plaintiff: And in case the Court should be of opinion that the lands and premises so purchased by *R. Chartres* ought not to be deemed as purchased exclusively subject to the said jointure, and all arrears thereof, in exoneration, so far as regarded *R. Chartres* and those deriving under him, then that it might be referred to the Master to inquire and report the annual amount and portions of the jointure, and of the arrears thereof, which each denomination or parcel of said lands and premises so purchased by *R. Chartres*, and the lands and premises still remaining unsold, ought to contribute towards payment of the arrears of the said jointure, and of all future accruing gales thereof, during the lifetime of *Elizabeth Chartres*; and that such portions thereof as the Master should report as fit and proper to be contributed by the said lands and premises respectively, might be decreed well charged thereon; and that all accounts proper and necessary for the said purpose, and for the plaintiffs' relief in the premises, might be directed and taken.

The Appellant, in his answer to the bill, admitted amongst other things that the Master, in pursuance of the decree in *Chartres v. Chartres*, set up and sold to *R. Chartres* the lands and premises in the bill described, subject to their fair proportion of the jointure, but not exclusively subject thereto, as in the bill alleged; and he submitted that all the lands and premises comprised in the deed of 1784, being by

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express words liable to the payment of the jointure, the Master could not, according to the statement of title to the said lands then before him, set up any proportion of the said lands and premises exonerated from the said liability, all the said lands being alike subject to the payment of the jointure; and he also submitted that the lands and premises sold to *R. Chartres* could not, without an express declaration to that effect, be made exclusively liable to the jointure.

The Appellant denied that he was in any manner aware that the sales by *W. Chartres* of the *Poudladine* Road fields to *W. Connolly*, and of the lands of *Duzzy* Island to *Eyre*, were under stipulations that these fields and lands should be exonerated from contribution to the jointure and charge; and he distinctly negatived the statement of the bill as to the arrangement for the sale of parts of the said lands exclusively liable to the jointure, stating that it was utterly untrue, as by the bill alleged, that it was arranged and agreed by and between the Appellant and the other parties in the bill named, or any other person or persons, that parts of the said lands and premises in the said marriage settlement comprised, and not theretofore sold by *W. Chartres*, subject exclusively to the said jointure, sufficient to produce sums to satisfy the purposes of said decree in the cause of *Chartres v. Chartres*, should be set up and sold under the decree, so as that the sales theretofore made of parts of the said lands and premises to *W. Connolly* and *Eyre* should remain unaffected; or that such parts of the said lands and premises as might remain unsold under the said decree should be exonerated from all future accruing gales of said jointure; no such arrangement or agreement having to the knowledge, information, or belief of Appellant, ever existed: And

the Appellant on his own part positively denied that he was a party or privy to any such arrangement or agreement; and he submitted that the Master could not have set up the lands in the bill mentioned otherwise than as subject to the said annuity, to which the same were subject in common with all the other lands and premises comprised in the indenture of 1784; and the Appellant also denied that if the lands sold to *R. Chartres* were subject only to a proportionate part thereof, the same, according to the relative value of the lands and premises so purchased by *R. Chartres*, and the other lands and premises comprised in the settlement of 1784, would have been worth 2,500 *l.* more than the said sum of 3,750 *l.*, as by the bill alleged; the Appellant believed that that sum of 3,750 *l.* was more than the value of said lands, subject to their fair proportion of said jointure: And the Appellant admitted that in 1824 he and *R. Chartres* filed a bill for an apportionment of the jointure amongst all the lands and premises, and that *W. Connolly* and *Eyre* put in answers to the effect in the Respondent's bill stated; but he said it was untrue that the bill of 1824 was dropped for the reasons in the Respondent's bill alleged; the cause of its not being proceeded in, being in consequence of *R. Chartres*' insolvency.

The cause being at issue, witnesses were examined on both sides, and publication passed, when *W. Kirwan* died, leaving the Respondent surviving. The Respondent afterwards obtained an order for liberty, in respect of the right surviving to her, to proceed in the cause. The cause came on to be heard before the Lord Chancellor of *Ireland*, in *May* 1838. The only question in controversy on that occasion was, whether the lands and hereditaments of which *R. Chartres*

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became the purchaser in 1820 had been sold to him charged exclusively with the jointure of 300 *l.*, to the exoneration of the unsold lands; or whether they were sold subject rateably with the other unsold lands, to a fair proportion of that jointure. The evidence applicable to that question consisted of the notes of sale in the Master's office; and the Master's certificate of the sale of the lands and premises sold to *R. Chartres* in *December* 1820, were, "all subject to an annuity of 300 *l.* a year for the life of *Mrs. E. Chartres*, aged near sixty years;" and of depositions of a *Mr. Herrick*, who attended with *W. Connolly* at the sale as his solicitor. He deposed that the Master declared the said lands were to be sold subject to the said jointure; and that after *R. Chartres* was declared the best bidder, *W. Connolly* and one *O'Leary* then also present, complained that the lands did not produce their value even though subject to the jointure; and thereon *R. Chartres* and *H. Siree*, who was acting as his solicitor, declared that the lands being subject to the annuity of 300 *l.* for the life of a lady then but sixty years of age, decreased their value, and that the sum bid by *R. Chartres* subject thereto was, as they considered, the value of the lands and premises. A rental thereof was also exhibited in evidence amounting to 451 *l.*, and some valuers examined by the Respondent estimated the value of those lands and premises subject exclusively to the jointure at 4,200 *l.*, and at 4,800 *l.* if only subject thereto rateably with the other lands then unsold. It was also stated in *R. Chartres*' petition and schedule in the Insolvent Debtors' Court, that he had purchased the lands subject to the jointure. There was no evidence of the arrangement or agreement between *W.* and *R. Chartres* and the Appellant that these lands should be *exclusively* subject to the jointure.

It was contended by the Appellant's counsel, at the hearing of the cause, that the decree in *Chartres v. Chartres* did not authorise a sale of any portion of the lands charged exclusively with the jointure, and did not exonerate any portion of them; and that the evidence of the Respondent negatived the fact of the sale to *R. Chartres*, clothed with an exclusive liability to the jointure. It was also urged that *W. Connolly*, the plaintiff in the original cause, and who was present at the sale, had not by his bill put forward such a case, and that it was not competent to his representative to make a totally new case by her bill of revivor and supplement: and that it appeared by the evidence of a valuator that the value of these lands and premises in the year 1820, if purchased exclusively subject to the jointure, would have been about 1,700*l.*, and if purchased uncharged with the jointure, or any part of it, from 3,750*l.* to 4,300*l.*

On the part of the Respondent, her counsel relied on *Herrick's* evidence and on the notes of sale above stated.

The Lord Chancellor, in *June* 1838, pronounced a decretal order, whereby he directed that it should be referred to the Master to inquire and report what was the annual value of the lands and premises purchased by *R. Chartres*, in *December* 1820, at the sale under the decree in *Chartres v. Chartres*, having regard to the printed rental in the receiver's accounts, and such other evidence touching the annual value of the purchased lands as either party might produce; and that when the Master should have ascertained such annual value, he should further inquire and report what would have been a fair price to have paid for the said lands in *December* 1820, if they were to be sold subject exclusively to the payment of the jointure of 300*l.*

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for the life of *Elizabeth Chartres*, and also what would have been a fair price if sold subject rateably with the other unsold lands to a proportion of said annuity. And it was further ordered that the Master, in ascertaining such respective values, should be at liberty to take the opinion of a notary, not examined before in the cause, on the subject of such respective values.

The Respondent and Appellant proceeded before the Master under this order, and all the proofs respecting the value of the purchased lands which had been used at the hearing, were read before the Master, as also the evidence of several other witnesses as to the nature and value of the lands at the time of the sale.

The Master, by his report, dated the 14th of *June* 1839, found that the annual value of the said lands and premises, purchased by *R. Chartres* in 1820, amounted to the sum of 451*l.* 18*s.*; that the said lands and premises, if then sold exclusively subject to said jointure, were worth the sum of 4,180*l.* 1*s.* 10*d.*; and if sold subject rateably with the other unsold lands, to a proportion of the said jointure, were worth the sum of 4,822*l.* 1*s.* 10*d.*

The Appellant having filed seven exceptions to this report, the cause came on to be heard before the Lord Chancellor on these exceptions and on the merits, on the 4th of *November* 1839, when his Lordship ordered four of the exceptions to be allowed, and the others to be overruled, and that the report should go back to the Master, that he might review the same in respect to the annual value of the lands of *West Ballygenane*, therein found to amount to the sum of 106*l.* 19*s.*

The Master made his further report, finding as in his former report; and the Appellant filed two exceptions to the further report.

The cause was afterwards heard before the Lord Chancellor, in *January* 1840, upon the last-mentioned report, exceptions, and merits, when his Lordship by his decree, dated the 15th of *January* 1840, overruled these exceptions, and confirmed the report, and ordered that the decree made in the original cause of *Connolly* against *Chartres* and Others, bearing date the 4th of *July* 1828, should be absolutely confirmed: And after declaring the sum therein reported due to *W. Connolly*, with interest, to be well charged on the unsold lands, and after directing a sale of so much of the unsold lands, for payment thereof, as should be equal in value to the lands of *Peardstown*, it was by his Lordship further ordered that the said lands, or so much thereof as should be sold, be sold discharged of the annuity or jointure of 300*l.*; and it was further ordered, that the defendants, or such of them as were entitled to the lands sold in *December* 1820, should execute such proper deed or deeds as should be approved of by the Master, for discharging the lands which should be sold by virtue of this decree, and the purchaser or purchasers thereof, from the said annuity or jointure, and all arrears thereof: And it was further ordered, that the Appellant should pay to the plaintiff the costs of the supplemental cause from *November* 1836, the time of the filing of the supplemental bill and bill of revivor; and that the receiver in the cause of *Chartres v. Chartres* should be extended to this cause, to receive the rents and profits of the said unsold lands.

The appeal was against the three decrees of the 16th of *June* 1838, the 4th of *November* 1839, and the 15th of *January* 1840 (a).

(a) After the appeal was lodged, the Respondent married a Mr. *Aylmer*, and the Appellant died. The suit was afterwards revived in *Ireland*, and the appeal was revived by an order of the House,

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Mr. *Turner* and Mr. *Bacon*, for the Appellant:—
 It was not competent for the Respondent by bill of revivor and supplement to make a totally new case, and to pray for relief, as against the purchaser under the sale of 1820, altogether different from the relief prayed by *W. Connolly* by his original bill, and upon grounds not suggested by that bill.

By the decree in *Chartres v. Chartres*, the Master was not authorised to set up and sell any part of the estates thereby directed to be sold, charged *exclusively* with the jointure of 300*l.* That could only have been done by some agreement among the parties interested, but no such agreement was shown to have existed. To entitle the Respondent to the decree of 1840, after a lapse of so many years, some positive evidence should have been laid before the Court on her part, that the Master did sell, and that *Richard Chartres* did purchase, the lands and premises so sold in *December* 1820, exclusively subject to the jointure. The Respondent failed to do this; her evidence, such as it was, having gone to show that he purchased merely *subject*, not that he purchased *exclusively subject*, to the jointure. Even if the agreement alleged in the Respondent's bill had been proved, there could not be any suit brought by *Connolly* to enforce it; *Colyear v. The Countess of Mulgrave* (b). But there is no evidence on which the Court could act, of such an agreement. *W. Connolly* was himself present at the sale in 1820; he filed his bill soon afterwards as a creditor against the unsold estates; then it would be of the last importance to him, if any such agreement existed, to establish it.

in the name of *Horatio Nelson Siree* as Appellant in place of his late father, against *Aylmer* and Wife, as Respondents.

(b) 2 Keen, 81.

The decree in the cause of *Chartres v. Chartres*, not having authorised the Master to sell any part of the lands in that decree mentioned, charged *exclusively* with the jointure, and it having been therefore beyond the jurisdiction of the Master so to sell them, it cannot be presumed that he did so act beyond his jurisdiction and contrary to law.

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If it was proper to direct any inquiry at the original hearing in 1838, the inquiries directed by the decree then made, were not such as the nature of the case required and rendered proper, inasmuch as the fact whether *R. Chartres* purchased exclusively subject to the jointure or not, was thereby made to depend on the adequacy or inadequacy of the price paid by him—which was unjust—and upon further evidence to be taken before the Master. It is a well known rule of practice, that if a party fails to prove a material fact by evidence in the cause, he is not entitled to a reference to the Master to take further proof of it; *Murten v. Winchelo* (c).

[Lord *Cottenham* (who presided in the absence of the Lord Chancellor):—It will be more convenient to dispose of the decree first, because if the decree is wrong, it will not be necessary to inquire into the propriety of the consequential directions. If we shall think the decree right, then we will hear you on the other proceedings.]

The decree is manifestly wrong. It is evident from the notes of sale, and from the Master's certificate thereof, that he had set up and sold the lands subject to the annuity, as they really were subject thereto, *rateably* with the other lands and hereditaments comprised in the settlement of 1784, but no part of them was

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exclusively subject to or exonerated from it; all being liable to contribute their proportions according to the rules of law. As to the alleged agreement, there is no evidence at all of it except the vague recollection of Mr. *Herrick*, who was present at the sale as *Connolly's* solicitor. The Court, instead of granting the inquiries directed by the decree, ought to have dismissed the bill with costs.

The final decree was induced mainly by the result of the inquiry as to the value of the lands, whereas such result should have formed no element whatsoever in the case. If the value could rightly, under any circumstances, form an element in the case, the value as found by the Master was not so much beyond the price paid, as to justify the conclusion come to by the Court, in pronouncing the final decree.

Mr. *Kindersley* and Mr. *Hislop Clarke*, for the Respondent:—There was no question that, prior to the suit of *Chartres v. Chartres*, some parts of the lands originally subject to the jointure and charge were sold by *William Chartres*, exonerated therefrom, to *William Connolly* and to *Hedges Eyre*. The suit of *Chartres v. Chartres* was a friendly suit between the two brothers as the principal parties; and although the decree therein contained no declaration as to the exclusive liability of any part of the lands to the jointure, the parties interested in the property might and did enter into agreements for the exoneration of some parts, and the exclusive liability of other parts; as, for instance, the sale of *Granite-field* to Mr. *Spear* was free from the jointure. The inquiry directed by the decree of *June 1838*, to ascertain the value of the lands sold to *R. Chartres* at the time of the sale, was not an element in the cause; but the

object was, if they should be found to be more valuable than the sum paid, by the value of the jointure, to infer thence conclusively that they were sold exclusively subject to the jointure. If any doubt existed on that point, Mr. *Siree* is not the person to be heard to say he had any doubt: he was the solicitor in that cause, and had the whole management of it and of the sale. There were no conditions of sale advertised, but bidders did not attend, as it was understood that the lands were to be sold exclusively subject to the jointure; and that was clearly the belief of the Master, as appears from his notes of the sale and his certificate. If the matter was misunderstood, it was Mr. *Siree's* duty to have explained it, and his taking advantage now of his silence then would prove him to have been guilty of the grossest fraud. The purchase was for the greater part made for Mr. *Siree*, and he as purchaser and as solicitor conducting the sale knew very well whether the property was sold subject to the whole or to part only of the jointure.

[Lord *Cottenham* :—Those observations on the conduct of *Sirce* would be most important, if the bill had been framed to set aside the sale on the ground of fraud or concealment by him.]

We do not impute to him that he intended fraud: our case is, that he purchased the lands subject to the whole of the jointure, part of which he now attempts to throw on the other lands. If fraud was intended by him, he could not have found a better way of committing it than by allowing the sale to take place without any published conditions, but with the understanding, suggested by the expressions used by the Master, that the lands so sold were sold subject to the whole jointure. Our argument is, that if he was not guilty of the grossest fraud, there was an agreement between

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him and the other parties present at the sale that the property was to be sold exclusively subject to the annuity. To relieve him from the fraud, we say there was such an agreement.

[*Lord Cottenham*:—The case you make in the pleadings, stating an arrangement and agreement, acquits him of fraud.]

The property is set up for public sale, as subject to the annuity. *Siree*, the attorney conducting the cause and the sale, must know whether it was to be sold subject to the whole annuity, or to part only: the public supposed it was subject to the whole, for the public knew nothing of the other property comprised in the settlement; no mention was made of any other property; it was only stated that the property set up for sale was subject to the annuity. If there was anything equivocal in the expressions found in the notes of sale, the attorney who conducted it ought not to be allowed to avail himself of the equivocation.

[With respect to the inquiries directed by the decree of 1838 into the value of the lands sold, in the absence of satisfactory evidence in the cause, they referred to the recent case of *Lord Aldborough v. Trye* (*d*), and they submitted that it was also matter for the consideration of the House whether the Appellant had not precluded himself from being heard against that decree, inasmuch as if he found himself aggrieved by it, he ought to have appealed against it without delay, instead of acquiescing in it by his proceedings in the Master's office; and on that point also they cited the same case (*e*).]

Mr. *Turner* was about to reply—

(*d*) Vol. VII. *ante*, p. 436; see p. 456.

(*e*) *Id.* p. 455-6.

Lord *Cottenham* :—We will take an opportunity of looking at this case, being of opinion that the decree cannot be maintained, which is now our impression ; we do not ask you to reply now, but if we shall feel it necessary, we will make it known to you. Let the case stand over till this day week.

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Lord *Cottenham* :—The bill filed by the Respondent in 1836, stated that in 1810 *William Chartres* was entitled in fee (subject to an annuity of 300 *l.*, and a charge for portions of 3,000 *l.*) to lands called *Peardstown*, and other lands ; that in 1812 he mortgaged *Peardstown* to *Nicholas Connolly*, in fee, for 780 *l.* ; that in 1815 a settlement was made on the marriage of *William Chartres*, under which he was made tenant for life of all these lands ; and *Alicia* his daughter, an infant, is now tenant in tail ; that in 1817 a bill was filed by *Richard Chartres* and one *Durham*, to whom he had assigned a part of the charge for raising the 3,000 *l.* portion ; that in 1819 there was a decree for the sale of the estate to raise the 3,000 *l.* ; that in *November* 1819 a sale of part of the estate took place to a person of the name of *Spear* ; that in 1820 a sale took place of *Peardstown* and other lands to *Richard Chartres*, the plaintiff in that suit, subject to the 300 *l.* annuity ; that *William Connolly*, the representative of the mortgagee, opened the biddings in *December* 1821, and *Richard Chartres* again became the purchaser, subject to the 300 *l.* annuity, and *Peardstown* and the other lands were conveyed to him in *August* 1821 ; that on the 21st of *September* 1821, *Richard Chartres*, who purchased *Peardstown* and part of the other lands for *Sirée* the Appellant, his attorney in the cause, conveyed the same to him ;

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and that in *November* 1821 a bill was filed by *William Connolly* for an account of the surplus purchase-money, and for foreclosures, and for payment, out of other lands liable to the 3,000 *l.*, of so much of the same as had been paid out of *Peardstown*, the only land subject to the mortgage.

It is to be observed that this bill of *W. Connolly* confined itself to the 3,000 *l.* and did not ask any similar relief with respect to the annuity of 300 *l.* In 1826 a decree in that cause was made, directing certain inquiries; and in 1828 there was a report, and no farther proceedings appear to have been had in that cause. *Richard Chartres*, a party defendant, having become insolvent, a supplemental bill was filed in 1832, against his assignee, by *W. Connolly*. In 1836, *W. Connolly* having died, the Respondent, *Mrs. Kirwan*, being his administrator, filed the present bill against the Appellant. It appears that in 1814 *William Chartres* sold part of the lands subject to the 300 *l.* annuity to *W. Connolly*, and the Respondent is his heir. In 1815 another part of these lands was sold to one *Eyre*, who is not party to the present bill, nor is *Spear*, who was the purchaser of another part of the lands subject to the annuity.

The bill states that all these three sales were made under an agreement, which was known to *Richard Chartres*, that the lands so sold should be discharged from the annuity of 300 *l.*, and that it was agreed between *William Chartres*, *Richard Chartres*, and the Appellant *Siree*, that the lands sold under the decree in the cause of *Chartres v. Chartres* should be exclusively subject to the annuity; that the lands sold to *Richard Chartres* were worth 3,750 *l.*, the sum he paid, if subject exclusively to the annuity, and were worth 2,500 *l.* more, if liable

to it only *pro rata* with the other lands. In this bill, which I have carefully looked through, there is no allegation of fraud; it proceeds on a statement of contract, which contract, if true, would exclude a case of fraud. There is no alternative statement of facts as to any fraud committed, as the ground upon which equitable relief is sought.

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The Respondent's bill states that in 1823, three years after the purchase, *Richard Chartres* and the Appellant filed a bill for the payment of the annuity out of those other lands *pro rata*; and that the Appellant received the whole of the rents of the lands purchased by him, and the rents of other parts, under pretence of the share of the 300 *l.* which had been assigned to him. The bill then prays that the lands purchased by *Richard Chartres* may be declared exclusively liable to the annuity of 300 *l.*, or that the proportion in which such lands and the lands unsold were to be liable may be ascertained and declared; and it prays for a receiver.

Now it is to be observed that *William Connolly*, who had opened the biddings, was present at the sale to *Richard Chartres*; but by his bill of 1821 he made no case as to the 300 *l.* annuity. It is also to be observed that the decree did not authorise the Master to sell the lands discharged of the annuity, or exclusively subject to it. I have thought it material to point out distinctly the case made by the Respondent's bill, because it shows that she rested her case entirely upon an alleged agreement in 1820 between *William Chartres*, then only tenant for life of the estate, and *Richard Chartres* and the Appellant *Siree*, in the absence of the annuitant; that the portion of the estate purchased by *Richard Chartres*, and the Appellant through him, should be charged with the

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whole of the annuity of 300 *l.*, to the exoneration of the other portions, which were originally subject to it. That the Respondent failed, in the judgment of the Court, to prove any such agreement at the hearing, may be assumed from the absence of any declaration in support of it in the decree, and from the inquiries directed as to the value; inquiries, in my opinion, immaterial in any view of the case, and certainly useless if the Court had thought that any such agreement had been established.

Upon examining the evidence it appears that there was not any proof of the alleged agreement, which was positively denied by the answer. The notes of sales were relied upon as evidence to establish the agreement, because they described the property as subject to an annuity of 300 *l.*; and beyond all doubt such a description, though consistent with the fact, was most imprudent, as it did not specify that, though so subject, other property was also liable to the same charge; but certainly it does not amount to a statement that the lands described were exclusively liable to the annuity; and that it was not so understood is proved by the fact that the property in question was sold in two lots, one on the 20th and the other on the 27th of *April* 1820; and that in both lots the property comprised is described in the same terms as subject to an annuity of 300 *l.* If, then, the words imply an exclusive liability, the lands sold on the 20th would be exclusively liable; and the lands sold on the 27th, instead of being exclusively liable, would have been relieved from all liability from the previous sale on the 20th. *Herrick's* deposition proves no more than the notes of sale do. There is also further proof, most conclusive against the Respondent, that there never was any such agreement. *William Connolly*, who

represented *Nicholas Connolly* (both of whom are now represented by the Respondent, the plaintiff in the cause),—and in which *William Connolly* the mortgage now claimed by the plaintiff was then vested, and who had therefore the same interest in throwing the whole of the annuity upon the land purchased by *Richard Chartres* as the plaintiff now has,—though not a party to the suit in which the decree for sale was made, intervened in the sale, and opened the biddings, and made an affidavit for that purpose, and bid at the second sale, and in *November* 1821 filed a bill for the purpose of throwing upon the other lands charged with the 3,000 *l.* as much as those parts of them which were comprised in his mortgage had contributed to pay by means of those sales ; and he obtained a decree in that cause in 1826. But neither upon the occasion of his so opening the biddings, nor in his bill, did he set up any such agreement as that alleged by the plaintiff in her bill of 1835, although *Richard Chartres* and *Siree* in 1824 filed a bill against this *William Connolly* and others, for the purpose of having the annuity raised and paid *pro rata* out of the different portions of the property liable to it (which bill is stated in the bill of 1835), and thereby gave to all parties notice of what he claimed to be entitled to.

The rental and the receiver's accounts in *Chartres v. Chartres*, were also referred to ; but it was not explained how these documents, taken from the proceedings in a cause to which *Siree* was not a party, could be used against him ; and yet the Master is, by the decree in this cause, ordered to have regard to them. It is therefore unnecessary to observe in detail what they contain ; but it is satisfactory, considering the course which I feel bound to advise your Lordships to adopt, that they do not contain any evidence

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in support of the alleged agreement, but rather the reverse ; as the case attempted to be proved by these documents is that *Siree* received all the rents of the lands purchased by him, without contributing anything towards the annuity ; and not that after the purchase he had paid the whole of it out of those rents, which under any such agreement he ought to have done.

It was argued that if there was no such agreement, there was gross fraud in the conduct of the sales under the decree ; and that *Siree*, the solicitor of the plaintiff in that cause, was the author of the fraud, and profited by it in his purchase. That the purchase by *Siree*, the plaintiff's solicitor, was an extremely improper act, and contrary to the settled rules of equity, is perfectly true ; but perhaps not more so than that *Richard Chartres*, the plaintiff in that cause, should himself become a purchaser without leave of the Court ; and this was known to all parties, and to *William Connolly* amongst others, at the time of the sale ; and so early as 1824 *Siree* himself, as a plaintiff in the bill of that year, avowed himself a purchaser ; but no objection was made to any of the purchases on this ground by *William Connolly*, nor is any relief prayed upon the ground of such imputed fraud in this suit. It was only used in argument in aid of the case founded upon the alleged agreement. The Court, it was argued, must presume the agreement, because if there was no agreement, there was fraud. In the absence of all evidence, no agreement can be presumed upon any such ground ; nor can the Court for any purpose act upon a case of misconduct and fraud which was not put in issue by the pleadings, and which the defendant therefore had no opportunity of meeting.

It was urged that the decree only directed inquiries, and that a Court of Appeal would not readily reverse a decree which only sought better information. This is true where the inquiries are of a nature to lead to a satisfactory solution of the question between the parties, but has no reference to the present case, in which the objection is that they cannot do so. If it be true that in the absence of all direct evidence the alleged agreement cannot be *inferred* from the price at which the property was bought at the auction, the result of the inquiries directed must be immaterial to the decision of the suit.

I am, for these reasons, of opinion, that the Respondent, the plaintiff below, has failed to establish any case upon the ground of the alleged agreement, or of the imputed fraud.

It was then said, that if the plaintiff has failed in showing that the lands purchased by *Richard Chartres* and the Appellant ought to bear the annuity exclusively, the plaintiff, the mortgagee of the lands sold, was entitled to have the annuity raised and paid out of such lands proportionably with the other lands upon which it was charged. Such a case might have arisen, if the plaintiff had alleged and proved that a part of the *corpus* of the estate subject to the mortgage had been exhausted in paying a larger proportion of the arrears of the annuity than it ought to have borne; but as a mortgagee not in possession has no right to an account of by-gone rents, it is immaterial how the annuity was paid out of the income of the estate charged with it, prior to the filing of the plaintiff's bill against the Appellant *Siree* in 1835. There is no case alleged and proved of misapplication of the property mortgaged in satisfaction of the annuity which the plaintiff can

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be entitled to have set right by a decree, and it is not the course of a Court of Equity to declare a right which it is not asked or which it is unable to enforce; and in this case it would be totally useless, because if the lands purchased by *Richard Chartres* and the plaintiff are not exclusively liable to the annuity, no question exists as to their being liable to it *pro rata* with the other portions charged. If the plaintiff had intended to ask any decree upon this part of the case, he could not have obtained it in the absence of the owner of the other parts of the lands charged, such as *Mr. Eyre* and *Mr. Spear*. In fact he has made no case for any such decree, and the objection therefore is upon the merits and not for want of parties: I am therefore of opinion that the whole of the plaintiff's case failed and was incapable of being aided by the result of the inquiries directed, and that the bill ought to have been dismissed against the Appellant at the hearing, with costs; but as he did not come to this House to reverse that decree, but permitted the inquiries and other proceedings to be prosecuted without taking the proper steps to relieve himself from the decree, I think that he cannot now be relieved from his own costs of such inquiries and proceedings, though they necessarily fall to the ground. I move your Lordships, therefore, that the decree of the 13th of *June* 1838 be reversed, and the bill as against the Appellant be dismissed with costs, up to and including the hearing.

If it appears to the counsel for the plaintiff in the cause that there is any apprehension that the dismissal of the bill might have the effect of preventing hereafter its being pleaded in bar to the suit for apportioning the annuity, it certainly cannot be your Lordships' intention that this order should have any

such effect. If therefore it is asked, I think your Lordships may very safely add to the order which your Lordships will make, a declaration that the bill be dismissed without prejudice to any bill that may hereafter be filed for the purpose of apportioning the annuity.

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Lord *Campbell*:—I take exactly the same view of the case as my noble and learned friend has done; and, as he has travelled over the whole so very elaborately, I think it may be quite enough for me to say that I rest my opinion upon this short ground—which is quite satisfactory to my own mind—that the foundation of the bill to which the present Appellant was made a party was an agreement; without that agreement I apprehend there would have been no equity disclosed against him: when the cause came to a hearing there was not a particle of evidence to support that agreement, and looking at the facts that are in evidence I should say that no such agreement was ever entered into. What then ought to have been done? The bill ought to have been dismissed, with costs. The inquiry which was directed was in my mind wholly immaterial, because such an agreement cannot be inferred from inadequacy of price. I apprehend therefore that the proper course will be exactly that which has been suggested by my noble and learned friend; and if it will meet the justice of the case, there will be no objection, I apprehend, to add those words which he has proposed to the judgment of this House.

Mr. *Hislop Clarke*, of counsel for the Respondent, the plaintiff in the cause, asked their Lordships for a declaration to that effect.

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Mr. *Turner* said he supposed the order of their Lordships would be to reverse all the orders appealed against, and to dismiss the cause.

Lord *Cottenham*:—All the orders, of course; and to dismiss the bill with costs, up to and including the hearing in the Court below.

[It was ordered and adjudged, that the said several decrees or decretal orders of the 16th of *June* 1834, 4th of *November* 1835, and 15th of *January* 1840, be reversed; that the bill of revivor and supplement filed the 2d of *November* 1836, be dismissed, with costs of the proceedings to Mr. *H. Siree*, up to and including the hearing in the Court below on the 16th of *June* 1838, to be paid to the Appellant *Horatio Nelson Siree*.

And it was declared that this judgment shall not prejudice any bill that may be filed for the purpose of apportioning the said annuity among the several denominations of lands charged therewith.]

JAMES ROE, on the Demises of	} <i>Plaintiff in Error.</i>	1842:
JOHN THOMAS BARON TRIMLES-		June 16. 18.
TOWN and Others - - -		30.
		1843:
HENRY KEMMIS, Esq. - - -	<i>Defendant in Error.</i>	March 6.

A Court of Error in *England*, upon a bill of exceptions brought before it by writ of error, is bound to decide on the validity of the exceptions, and to allow or disallow them; and also to correct any errors in the record to which the bill of exceptions is annexed, and to affirm or reverse the judgment of the Court below, according to law.

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But such Court cannot select a part of the evidence set forth in the bill of exceptions, not being the subject of exception, and decide the cause on arguments applied to that part of the evidence, or on the consideration of its bearing on the merits of the case.

Secus, in the case of a special verdict, or demurrer to evidence.

The *Irish Acts*, 28 G. 3, c. 31, and 40 G. 3, c. 39, have not given the Court of Error in *Ireland* any larger power, or different rule of law, for adjudicating on the record and bill of exceptions brought before it, than those which belong to and govern the Courts of Error in *England*.

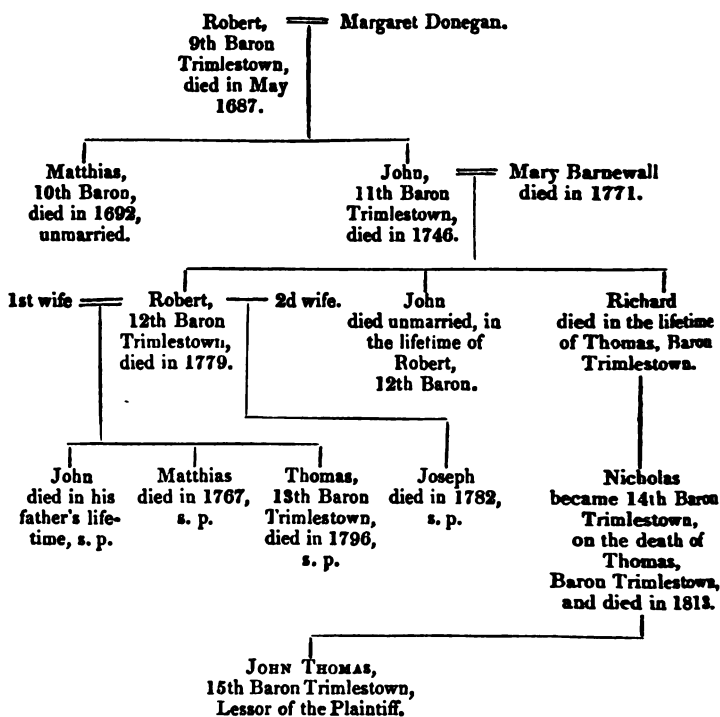
(*For the decisions on the exceptions, involving important rules of evidence, vide infra*, p. 773 *et seq.*)

THIS was a writ of Error on a judgment of the Exchequer Chamber in *Ireland*, affirming a judgment of the Court of Common Pleas there, upon a Bill of exceptions taken at the trial of an action of ejectment, which was brought by the Plaintiff in Error to recover the manor, town, and lands of *Roe-buck*, and the lands of *Clonskeagh*, in the county of *Dublin*. The declaration, dated of Trinity term 1833, contained three sets of counts, for various terms, on the several demises of *John Thomas Baron Trimlestown* and *Edward Blake*, and on the joint demises of the said *Baron Trimlestown* and *John* and *Charles Nugent*. The premises sought to be recovered were described as lately in the possession of *Thomas Kemmis*,

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deceased, his tenants or under-tenants, and then in the possession of *Henry Kemmis*, his tenants or under-tenants. *Henry Kemmis* being admitted to defend for all the premises, pleaded not guilty to the whole declaration; and the issue joined thereon was tried in *June* 1835, when a verdict was found for the Defendant.

From the evidence given by the plaintiff at the trial, and contained in the bill of exceptions, the following pedigree is deduced:—



The plaintiff's further evidence showed, that *Robert*, 9th Baron *Trimlestown*, by an indenture of settlement, dated the 4th of *September* 1686, and purporting to be executed in pursuance of articles made on his marriage with *Margaret Donegan* in *July* 1688, con-

veyed the lands and tenements mentioned in the declaration, among others, to *William* Earl of *Limerick* and *Nicholas* Viscount *Netterville*, their heirs and assigns, in trust to the use of him (the settlor) for life, remainder to the use of his eldest son *Matthias*, for life, remainder to the said *Matthias*'s first and every other son in tail male; remainder to the use of *John*, the settlor's second son, for life, remainder to *John*'s first and every other son in tail male, with divers remainders over, and the ultimate remainder to the use of the right heirs of the settlor. And the indenture contained a power to the said *Matthias* and *John*, or either of them, to make such jointures, and provisions for younger children, as the said Earl of *Limerick* and Viscount *Netterville*, or the survivor of them, or the heir or heirs of such survivor, should approve of. This indenture being in a decayed state and illegible, the inrolment of it was produced and read at the trial.

Amongst the other instruments produced on the part of the plaintiff, were a decayed original and an inrolment of an indenture of settlement, made on the 23d of *March* 1703, between *John* 11th Baron *Trimlestown* of the one part, *Thomas* Earl of *Limerick* and *John* Viscount *Netterville* (heirs at law of the trustees in the above-stated indenture of 1686), and Dame *Thomasine Barnewall*, of the other part; which—after reciting the said indenture of 1686, and the power therein contained, and also that the said Lord *John* was then seised of certain freehold estates, including the lands of *Roebuck*, &c., by virtue of the indenture of 1686,—further recited certain articles entered into on his marriage with *Mary Barnewall* (daughter of Dame *Thomasine*), and particularly the fourth article, to the effect that the said *John* covenanted for him,

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his heirs, executors, &c. with the said Dame *Thomasine*, her executors, &c., with consent of the said Earl of *Limerick* and Viscount *Netterville*, that the said "*John* Baron *Trimlestown* and his heirs shall settle on the said *Mary*, for her jointure, and in consideration of the said marriage and marriage portion and settlement to be made by the said Dame *Thomasine* on the said *John* and his heirs, by virtue of a power reserved in the settlement of the Right honourable *Robert* late Baron *Trimlestown*, bearing date the 4th of *September* 1686, whereby," &c. (stating the said power), "and that the said *John* Baron *Trimlestown*, by consent of the said *Thomas* Earl of *Limerick* and *John* Viscount *Netterville*, will settle on the said *Mary Barnewall* so much of the said lands, &c. settled by the aforesaid settlement of the said *Robert* late Baron *Trimlestown*, as shall be and now are of the clear yearly value of 400 *l. per annum*, during her natural life; and in case the said *John* Baron *Trimlestown* shall die without issue male of his body lawfully begotten, that then and in such case the said *Mary Barnewall* shall have an increase of 300 *l. per annum* to the said 400 *l.* out of the rest and residue of the said estate so settled by the said *Robert* Baron *Trimlestown*, so as to make her a jointure of 700 *l.* a year during her natural life," &c. in lieu of dower. The indenture then witnessed, that in performance of the said article and of the said power, and with the consent of the said trustees, the said *John* Baron *Trimlestown* granted the said lands of *Roebuck*, and the lands of *New-Haggard*, in the county of *Meath*, to the said Earl of *Limerick*, Viscount *Netterville*, and Dame *Thomasine Barnewall*, and their heirs, during the life of the said *Mary Barnewall*, to hold the premises to them and their heirs during the life of

Mary Barnewall, to the use and behoof of her and her assigns, and for settling and securing to her a jointure of 400 *l.* if she should have issue male by the said Lord *John*, that should live to inherit the said late Lord *Robert's* estates; and for want of such issue, to the use and purpose that the said *Mary* should hold the said lands in the settlement of 1686, and receive thereout 700 *l.* during her life, for her jointure and in lieu of dower; and if the said lands should come short of 700 *l.* a year, to have it out of the rest of the lands mentioned in the settlement of 1686.

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John Baron *Trimlestown* died in 1746 (as appeared by the evidence of pedigree), leaving *Mary* his wife (who died in 1771), and three sons by her, *Robert*, *John*, and *Richard*. *John*, the second son, died without issue; *Robert*, the eldest, had issue by his first wife, three sons, *John*, *Matthias*, and *Thomas*; and by his second wife, one son, *Joseph*. Of these four, *John* and *Matthias* died in their father's lifetime without issue; *Thomas* succeeded to the title on the death of his father in the year 1779, and died without issue in 1796, whereupon—his half-brother *Joseph* having previously died without issue—the title and estates fell to *Nicholas*, son of *Richard*, the third son of the said *John* Lord *Trimlestown*. The lessor of the plaintiff, as only son and heir of Lord *Nicholas*, claimed the estates as tenant in tail under the settlement of *September* 1686.

The plaintiff also put in evidence several bills and answers in Chancery, and orders thereon. The first of these bills was filed in 1771, by *Thomas Barnewall*, afterwards Lord *Trimlestown*, against his father, and one *Shee* as executor of the said *Mary* Lady *Trimlestown*. *Shee's* answer contained a list of deeds and writings relating to the lands to which the said *Mary*

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was entitled for her jointure—as prayed by the bill—and a statement by him, that he believed he was entitled to the custody of the deeds until he should recover considerable arrears due to her out of the lands of *Roebuck*, &c. It was then shown, that under an order of court to produce those deeds, *Shee* brought them into court in a box, and lodged the same with the usher. (The two decayed indentures of 1686 and 1703, before stated, were produced from that box at the trial of the ejectment.)

Another of the said bills was filed in 1816 by the lessor of the plaintiff against *Thomas Kemmis*, father of the Defendant in Error, afterwards amended against the defendant and his wife. In their answer, filed in 1824, this defendant stated that the lands (in the declaration mentioned) were held by him by virtue of leases granted to his father by *Thomas Lord Trimlestown*, dated the 4th of *March* 1785 and 30th of *May* 1788, and other leases granted also to his father by Lord *Nicholas*, dated the 24th of *September* 1798 and 14th of *October* 1799; all which leases were settled on defendant's wife by marriage settlement, dated the 9th of *June* 1804.

Another of the bills produced in evidence by the plaintiff was filed in 1774 against the said *Thomas* afterwards Lord *Trimlestown*, by his sister. The answer thereto by the said *Thomas* stated that he had been informed and believed that his father (the second Lord *Robert*) became, immediately on the death of his (*Robert's*) father (Lord *John*), entitled to and seised of the reversion in fee tail of the lands of *Roebuck* and *Clonskeagh*, expectant upon an estate therein of *Mary* his mother, for her life, as part of her jointure by settlement. And he admitted that the said *Mary* was entitled, by settlement, to the

rents of the said lands from the death of her husband for her life, and believed that she accordingly enjoyed the same and received the rents from his death to the time of her own death in 1771; and that on her death, the said Lord *Robert* became possessed of the said lands, and was seised and possessed thereof at the time of filing this answer.

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The seisin of the Lords *Thomas* and *Nicholas* respectively, in the lands in question, was admitted by the defendant.

The evidence for the defendant consisted, among other matters, of copies of a fine levied by the second named *Robert* Lord *Trimlestown*, to one *Read*, in 1747, of the manor and lands of *Roebuck*, and of a recovery suffered thereof in the same year, one *Abbott* being the demandant, the said *Read* the tenant, and the said Lord *Robert* the vouchee. To this fine and recovery the said *Mary* Dowager Lady *Trimlestown* was not a party. It was then proved that the second Lord *Robert* was a papist all his life, and that his sons *Matthias* and *Thomas* also were papists, but conformed to the Established Church; *Matthias* in 1763, and *Thomas* in 1767. (The object of the defendant in this evidence was to infer therefrom, and from the *Irish Act 2 Anne*, c. 6, that the estate in tail male expectant on the death of *Robert* the father, was enlarged into an estate in fee simple in the sons.)

The defendant next produced a parchment writing, dated the 20th of *July* 1668, purporting to be the articles made on the marriage of the first-named *Robert* Lord *Trimlestown* with *Margaret Donegan*; and another "parchment writing, purporting to be the upper part of the first skin of an indenture, bearing date the 16th of *March* 1679, which had originally consisted of two or more skins, and which parchment

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appeared to have been severed with a sharp instrument." This latter instrument, as far as it was legible, appeared to be an indenture executed in performance of the said marriage articles of *July* 1668. It was proved to have been found, just before the trial, among the papers of the *Trimlestown* family, delivered to their agent by the executor of *Thomas Kemmis*, their former agent, in the year 1823, after certain litigation had begun between the lessor of the plaintiff and the defendant; of all which papers a list was made, and the entry therein of this parchment writing was written over an obliteration of a previous entry of another deed.

The reception of this instrument in evidence was the matter of the plaintiff's first exception.

His second exception was to the reception for the defendant of a deed of conveyance, by lease and release, dated the 9th of *June* 1812, by which *Nicholas* Lord *Trimlestown*, in consideration of 29,412*l.*, granted to *Solomon Richards* and his heirs certain lands, including those mentioned in the declaration, subject to leases described in a schedule to the deed, among which were the leases before mentioned as made by *Nicholas* Lord *Trimlestown* to *Thomas Kemmis*, dated respectively the 24th of *September* 1798 and 10th of *October* 1799.

The plaintiff's third exception applied to the reception for the defendant of a deed of compromise, dated *September* 1833, and made between General *Evan Lloyd* and his wife (widow of *Nicholas* Lord *Trimlestown*) of the one part, and the lessor of the plaintiff of the other, showing the dealings of the *Trimlestown* family with the property in question.

The fourth exception taken by the plaintiff to the defendant's evidence applied to a bill filed in Chancery in the year 1822, by one *Rochfort*, as adminis-

trator of *Nicholas Lord Trimlestown*, against his agent the said *Thomas Kemmis*, for accounts of the rents of the lands of *Roebuck*; and to the decree made in that cause.

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A fifth exception taken by the plaintiff was to the reception in evidence for the defendant of the bill filed by the lessor of the plaintiff against the said *T. Kemmis* in 1816, which had been before put in evidence for the plaintiff.

In reply to the case made by the defendant, the plaintiff produced further evidence; and first, he put in an examined copy of a petition presented by *John Lord Trimlestown* in 1700 to the trustees of forfeited estates in *Ireland*, claiming restoration of the family estates as a purchaser under the settlement of 1686; and a copy of a decree by the trustees, dated *September 1701*, allowing the claim. The plaintiff—for the purpose of showing that the deed of *March 1703* was executed, and of rebutting any presumption of a conveyance or surrender of the life estate thereby created for the said *Mary's* jointure—offered to put in an abstract of title of Lord *Nicholas* to the lands of *Roebuck*, stating it to be in the handwriting and found in the possession of his law agent, the said *T. Kemmis*, at his death, together with other papers of the *Trimlestown* family. The rejection of this abstract by the Judge formed the matter of the plaintiff's sixth exception. The plaintiff then offered for the same purpose an answer put in to a bill in Chancery by Lord *Robert* in 1768, wherein he admitted that, until the conformity of his son *Matthias*, he was, as he believed, entitled to a reversion in tail in the lands of *Roebuck*, expectant on the death of his mother, Lady *Mary*. This and another answer to the like effect, put in by the same Lord *Robert* to another bill in 1772, were received.

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But the Judge rejected an answer put in by Lord *Thomas* in the year 1780, to a bill filed against him by one *Devereux*; in which answer he stated "that he had heard and believed that in 1747 Lord *Robert* levied fines and suffered recoveries of *New-Haggard* and other lands, to which it was in the bill alleged that he was entitled under limitations in his family settlement; but was informed and believed that the said *Mary* never joined in levying said fines or suffering such recoveries, and that she had informed him, *Thomas*, that she refused to join her said son *Robert* in levying any fine or suffering any recovery of any of her jointure lands, though often pressed by him for that purpose. The rejection of this answer was the matter of the seventh exception.

The eighth exception was taken to the rejection by the Judge of an answer by Lord *Thomas*, in 1787, to a bill filed against him by a Miss *Preston*, in which he stated his belief that Lord *Robert*, on his father's death, became seised of a reversion or remainder in tail male in the lands of *Roebuck* and *Clonskeagh*, expectant on the death of his mother (*Mary*), who, as he believed, had the same for her jointure. And the plaintiff's ninth exception was to the rejection of an examined copy of a record of a special verdict and judgment in the Court of Exchequer in *Ireland*, in 1783, in an action of ejectment, brought by Lord *Thomas* against his brother *Joseph Barnewall*, to recover certain lands, including those now in question.

The Judge, on the evidence being closed on both sides, charged the jury to consider whether the said deeds or parchment writings of 1679, 1686, and 1703, were or were not executed by the respective parties named in them; and he directed them, that if they were of opinion that the two last of these deeds were duly executed, they were nevertheless at liberty to

presume a surrender or other conveyance by deed, by Lady *Mary*, of her life estate under the deed of 1703, to Lord *Robert* her son, previous to the fine and recovery in 1747; and he further directed them, that from the two leases by *Thomas* Lord *Trimlestown* in 1785 and 1788 to *T. Kemmis*, and the two subsequent leases from Lord *Nicholas* to the same party in 1798 and 1799, and possession thereunder, as also from the sale and conveyance to *Richards* in 1812, and the absence of any recovery since Lady *Mary*'s death, they might presume such surrender or other conveyance by Lady *Mary*. He added, that if the jury believed the deeds of 1686 and 1703 not to have been duly executed, or if, believing them to be duly executed, they should be of opinion that a surrender or other conveyance had been made by Lady *Mary* of her life estate previous to the fine and recovery, they should find for the defendant.

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To this charge the plaintiff's counsel took three exceptions: *first*, that the execution of the mutilated deed of 1679 should not have been left at all to the jury, on account of its imperfect state; *second*, that the jury should not have been directed, if they believed in the execution of the deeds of 1686 and 1703, to presume a surrender by Lady *Mary*, nor should they have been directed to consider the several leases to *T. Kemmis* and the sale to *Richards*, together with the absence of any fine and recovery subsequent to Lady *Mary*'s death, as grounds for presuming a surrender by her; and *third*, that the Judge should not have directed the jury, if they believed in the deeds of 1686 and 1703, but presumed a surrender by Lady *Mary*, to find for the defendant; but that the jury should have been directed, if they believed in the due execution of those deeds, to find for the plaintiff.

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The cause was brought before the Court of Common Pleas (in which the action had been brought), upon a bill containing the said exceptions annexed to the *postea*, pursuant to the *Irish Act* of Parliament, 28 *G. 3*, c. 31 (*a*). Judgment having been given by that Court for the defendant, the cause was brought by writ of error before the Court of Exchequer Chamber in *Ireland*, pursuant to another *Irish Act*, 40 *G. 3*, c. 49 (*a*); and the judgment, after full argument of the exceptions, and of the operation of the deed of 1703, was affirmed, with costs (*b*).

Chief Justice *Bushe*, delivering the judgment of the Court of Error, said (as appeared by a note of it printed by the parties in the Appendix to their cases, and also by the report just referred to, at p. 604):—
 “The lessor of the plaintiff claims as tenant in possession, under a settlement executed in 1686 by *Robert Lord Trimlestown*. By his pedigree he established a *prima facie* case.” [His Lordship, after stating the pedigree to the effect set forth in pp. 750 and 751, *supra*, proceeded:] “That case was answered, on the part of the defendant, by alleging that *Lord Robert*, who died in 1779, had suffered a recovery in 1747, which, by opening the estates, enabled *Lord Thomas* and *Lord Nicholas* to make leases on the part of the lessor of the plaintiff. This argument was met by saying that the recovery was unavailing, because *Mary Barnewall* did not join in it, although she had a life estate under the deed of 1703, and under the settlement of 1686, executed by her husband’s father. That allegation was encountered by the defendant by saying that she took no legal estate; and, secondly, that

(*a*) The Act is explained by Lord Chief Justice *Tindal*, *infra*, pp. 772 & 773.

(*b*) 1 *Jebb & Symes*, 587.

even if she did, there was evidence for a jury to presume that it had been surrendered to her son *Robert*. The learned Judge left the question to the jury as to the construction to be put upon the two deeds, and told them they might presume a surrender or other conveyance by *Mary Barnewall* to *Robert Lord Trimlestown*. The jury found for the defendant, and the plaintiff took exceptions thereto [to the Judge's charge], together with several other exceptions. If it were necessary to give an opinion on these different exceptions separately, some of them would probably be overruled and some of them allowed; but this is unnecessary, for we are unanimously of opinion that, from what appears on the face of the record, the judgment of the Court of Common Pleas ought to be affirmed. That rests on the true construction of the deed of 1703, that no legal estate passed to Lady *Mary*; and that therefore it was not necessary that she should have joined in the recovery." [His Lordship, having stated the provisions in the deed of 1703, and the power in the deed of 1686, proceeded:] "The question is then upon these deeds; whether the deed of 1703 is a good execution of the power contained in the deed of 1686, whether it passed a legal estate to Lady *Mary* or her trustees; if not, the recovery is unexceptionable. We are all of opinion that the power in the deed of 1686 was not well executed by the deed of 1703."—"We are therefore unanimously of opinion that no legal estate passed, no surrender was necessary, and that judgment should be given for the defendant on the writ of error. We feel ourselves warranted in coming to this conclusion by the statute law of *Ireland*; looking first to the 28th of *G.* 3, c. 31, s. 1, which enacts that the Court before whom the bill of exceptions was to be brought

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should have authority to examine and give judgment on the whole bill of exceptions, or make such order, either by arresting the judgment, granting a *venire facias de novo*, or otherwise, as should be agreeable to justice. That statute was followed by the 40th of G. 3, c. 49, constituting this Court as a Court of Error, and giving it full power to reverse or affirm the judgment of the Court below on the whole matter; and on examination of the whole record, we are of opinion that the judgment of the Court of Common Pleas is right, and that it be affirmed, with moderate costs."

The present writ of error upon the said judgments of the Courts in *Ireland*, was argued in the presence of the learned Judges (c).

Mr. *Kelly*, for the Plaintiff in Error:—It must be assumed that the bill of exceptions contains the whole of the matter that was before the Court of Exchequer Chamber, in *Ireland*. To the contents of that bill the judgment of this House also must be confined. Now the title of the Defendant in Error was founded upon certain leases, alleged to have been granted to his father by Lord *Thomas* and Lord *Nicholas*, and much of the Judge's charge to the jury applied to them; but there is no evidence of the existence of these leases contained in the record: they are mentioned in the bill and answer in Chancery, which are the matters of the fifth exception, but it does not appear by the record that they were in existence at the time when the ejectment was brought. It must be taken for granted that there was no evidence material to the

(c) Chief Justice *Tindal*; Justices *Williams*, *Coleridge*, *Coltman*, *Maule*, *Wightman*, and *Cresswell*; Barons *Parke*, *Alderson*, and *Rolfe*.

question in dispute, that does not appear in the bill of exceptions. The case is not stated as a special verdict, containing certain findings of the jury, nor can it be so treated, but the whole record, and nothing out of the record, must be looked to. There is, therefore, an absence of all evidence of the substantial title set up by the defendant. The bill filed against him by the lessor of the plaintiff in 1816, the admission of which in evidence is the matter of the fifth exception, does not prove the existence of the alleged leases. A bill in Chancery proves nothing but its own existence; *Doe d. Bowerman v. Sybourn (d)*. The bill is never put in evidence except when the answer to it is made evidence, and then the bill is put in to show the facts that were in issue.

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[The *Lord Chancellor* :—And then the course is to read bill and answer from beginning to end. But it appears by the record that the plaintiff himself put this bill and the answer in evidence; how can he be heard to object to the reception of the whole or any part of them for the defendant?]

Mr. *Kelly* then took the exceptions *seriatim*, beginning with the first, and contended that the mutilated instrument, the subject of that exception, was not admissible in evidence, but if admissible, was not entitled to any weight, as being a small part of an instrument, and wholly illegible.—[The *Lord Chancellor* : But how often have parts of torn letters been read in a cause?—But it is a universal rule that when any document is produced and part read, the whole is to be read if the adversary require it; 1 *Stark.* on Evi. 359, and per Justice *Wilson* in *Master v. Miller (e)*. It would be a most dangerous relaxation

(d) 7 T. Rep. 2.

(e) Anstr. 227.

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of the rules of evidence to admit a deed of this sort, cut apparently with a sharp instrument, to be read for the party from whose custody it was produced.

The deed of conveyance to *Solomon Richards*, the subject of the second exception, was improperly admitted, inasmuch as the declarations, express or implied, of a tenant in tail that he was seised in fee simple, are not admissible in evidence against the issue in tail. Neither was the deed of compromise with General *Evan Lloyd* admissible, as it did not concern the particular property in question in the action of ejectment, and was irrelevant to the issue in that action, and calculated only to excite an improper prejudice. The same observations applied to *Rockfort's* bill against *T. Kemmis*, and to the answer and decree therein, which are the matters of the fourth exception. They were not only irrelevant to the issue between those parties, but were altogether *res inter alios actæ*. The lessor of the plaintiff had not only to complain of the admission of improper evidence, but also of the rejection of evidence offered by himself. The abstract of title referred to in the sixth exception was properly admissible for the plaintiff, being corroborative proof that the deed of 1703 was acknowledged, and acted upon as valid and effectual, and being evidence to rebut the presumption of surrender or conveyance by Lady *Mary* of her life estate under that deed, and being also, as a declaration by *T. Kemmis* in whose handwriting it was, evidence against every person claiming in privity with him.

The answers of *Thomas Lord Trimlestown*—the subject of the seventh and eighth exceptions—to the bills filed against him by *Devereux* and *Miss Preston*, would be most material evidence of the quantity of estates held in the premises by Lord *Robert* and Lord

Thomas. In those answers Lord *Thomas* stated that he was informed by Lady *Mary*, and that he believed the estates had been subject to her jointure during her life, and that she never joined in any recovery. Was not that evidence to rebut the presumption of a surrender of her life estate?

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The learned counsel, after arguing the other exceptions in their order as numbered and before stated, submitted, with respect to the conformity of *Matthias* and *Thomas Barnewall*, that even if the evidence were sufficient to raise a question on the construction of the Act, 2 *Anne*, c. 6, the conclusion of law suggested did not follow, for that the Act would operate only upon the estate vested in the Catholic parent, and would not affect the subsequent limitations. He further contended that the fine and recovery of 1747 did not prejudice the claim of the plaintiff's lessor; denied that *Robert Lord Trimlestown* could by fine or recovery affect the limitations over, and insisted that there was no estate to support the fine or recovery; the power to jointure conferred by the settlement of 1686, having been exercised by *John Lord Trimlestown*, and the heirs of *William Earl of Limerick* and *Nicholas Viscount Netterville*, by the deed of 1703, creating, in favour of *Mary* the wife of Lord *John*, an estate for her life in the manor and lands in question, and the Lady *Mary* being no party to the fine or recovery, and having survived her said husband and continued in possession of the property until her death in 1771. He finally contended that, whatever should be the decision of the House on the exceptions, the judgment of the Court of Exchequer Chamber, professing to be wholly independent of the exceptions, and founded upon that Court's opinion of the invalidity of the deed of 1703 as an execution of the power con-

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tained in the deed of 1686, must be reversed. The jurisdiction of that Court of Error, as of every Court on a bill of exceptions to evidence, should be confined to the matters of the exceptions, and there was no exception relating to this deed. He hoped, however, that the exceptions would be allowed and the verdict set aside, and that a new trial of the cause would be directed.

Mr. *Pemberton*, with whom was Mr. *Watson*, was heard for the Defendant in Error; but as the points of his arguments on the exceptions are comprised in the opinion delivered on behalf of the learned Judges, and hereinafter given, it is not necessary to give them here. The cases cited by him are noticed in the following reply.

The *Solicitor-general* (who had been elsewhere engaged at the opening of the case) was heard by way of reply:—If it were open to him to argue the case on the effect of the deed of *March 1703*, there being no exceptions applicable to it, he was prepared to show that that deed was a sufficient execution of the power to jointure contained in the deed of 1686.—

[The *Lord Chancellor*, after conferring with the other Peers present, said it was not open to the learned Solicitor to go into any matter that was not comprised in the exceptions.]

Finding that to be the opinion of their Lordships, to which he entirely submitted, he would assume that the judgment of affirmance, founded as it was on the supposed invalidity of the deed of 1703 as an execution of the power independently of the exceptions, must be reversed; and he would proceed to the exceptions taken by the plaintiff to the summing up of the learned Judge who tried the case. There were

three such exceptions, and two of them, the eleventh and twelfth, might be considered together, the question in them being whether the learned Judge properly left it to the jury to presume the surrender of the Lady *Mary's* life estate previous to the recovery of 1747, from the absence of any subsequent recovery and the long possession under the leases; whereas those alleged leases were not in evidence, nor any other facts on which that question could be properly left to the jury.

[The *Lord Chancellor*:—If there was any evidence of such facts, the Judge was right in leaving the question on them to the jury.]

There were no facts before the jury on which a surrender might be presumed. It was the Judge's duty to state the facts, if there were any, leading to the conclusion, and not to leave it to the jury generally to presume a surrender. The matter of the eleventh exception is, that the learned Judge ought not to have left to the jury the leases in that exception mentioned, and possession thereunder, and the sale or conveyance in the same exception mentioned, or the absence of any recovery having been suffered subsequently to the death of *Mary Lady Trimlestown*, as grounds among other matters for presuming a surrender or conveyance of her life estate, there being no admissible evidence of such leases, possession, or sale or conveyance. So also, as stated in the twelfth exception, the learned Judge ought not to have directed the jury that, if they should believe that the deeds of 1686 and 1703 were both duly executed, but that a surrender or other conveyance by deed had been made by Lady *Mary* of her life estate to her son *Robert* previous to the fine and recovery, they should find a verdict for the defendant; because that fine and recovery did not bar

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the remainders over, and even if they did, the lessor of the plaintiff became on the death of his father entitled to the fee-simple. The fine and recovery could operate only on the interests which *Robert* and the heirs male of his body took under the limitations, and the lessor of the plaintiff was shown to be the heir male of the body of *Richard*, one of the sons of *John Lord Trimlestown*.

The case of *Warren v. Greenville* (e), cited by Mr. *Pemberton* for the presumption of a surrender of a life estate on a recovery of many years standing, was not conclusive; for it appears by the observations on that case in *Goodtitle v. Chandos* (f), that the Court did not rely on presumption, but had positive evidence of the surrender by production of the books of the deceased attorney who drew it. The case of *Tenny v. Jones* (g), also cited by Mr. *Pemberton*, was upon the presumption of a reconveyance by a feoffee who never was in possession, to parties who never were out of possession; and did not apply to the present case, in which there were no facts in evidence to raise the presumption of a surrender of the life estate, but there was proof of the enjoyment of that estate by the tenant for life up to her death. There is no doubt of the fact that Lord *Robert* suffered the recovery, but the Court below or this House ought not to be guided by his dealings with the estate. If the leases of 1785 and 1788 were in evidence, it would be too much to presume, from the mere execution of them, a surrender and valid recovery in 1747. The declarations of Lord *Thomas*, in his answers to the bills filed by *Devereux* and Miss *Preston*, were admissible evidence against the party claiming under him by virtue of these leases;

(e) 2 Strange, 1129.

(g) 10 Bingh. 75.

(f) 2 Burr. 1065; per Lord *Mansfield*, 1072.

Woolway v. Rowe (h), *Crease v. Barrett* (i). The object of the bills filed against Lord *Thomas* was to charge him as tenant in fee-simple, and his answers declared that he was only tenant in tail. An answer thus cutting down a party's interest in lands, is admissible evidence against him and persons claiming under him. He says he is not tenant in fee, and that Lady *Mary* informed him that she never joined in the recovery suffered by Lord *Robert*. Therefore the recovery was not valid.—

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The *Lord Chancellor*:—You must keep within the exceptions.

The *Solicitor-general*, having directed the attention of the House again to the exceptions to the Judge's charge, contended that the whole of the summing up was wrong, and that the Plaintiff in Error was entitled to a new trial.

The *Lord Chancellor*, after conferring with the other Peers, proposed the following questions for the opinion of the Judges:—

“ 1st. Whether, regard being had to the 28 G. 3, c. 31, and 40 G. 3, c. 39 (*Irish Acts*), the judgment of the Exchequer Chamber in *Ireland* in this case can be supported, assuming that the exceptions are valid ?

“ 2d. Whether, regard being had to the several facts and exceptions stated in the bill of exceptions, any, and which, of the exceptions are valid ? ”

The learned Judges desiring time to prepare their answers to these questions, the further consideration of the cause was put off.

(h) 3 Nev. & M. 849; S. C.
1 Adol. & E. 114.

(i) 1 Crompt. M. & R. 919.

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THE Judges now attended to give their answers.

Lord Chief Justice *Tindal*:—The first question which your Lordships proposed in this case to Her Majesty's Judges, is this [his Lordship read it]; and we beg leave to state our opinion to be, that this question is to be answered in the negative. The answer to it depends on two considerations: *first*, what would be the rule of law if the present proceedings had been commenced in one of Her Majesty's Courts of Law at *Westminster*, and removed in their present shape by writ of error into an *English* Court of Error? and *secondly*, whether either of the statutes referred to in your Lordships' question has given to the *Irish* Court of Error a different power, or a different rule of law, for adjudicating on the record so removed, from that which belongs to and governs the Courts of Error in this country.

If the present action had been brought in *England*, and, after a bill of exceptions had been tendered at the trial and allowed by the Judge, the proceedings had been removed by writ of error, both the original record and also the exceptions tendered at the trial, together with so much of the evidence as related to those exceptions and was necessary to enable the superior Court to form its judgment thereon, would have been brought by such writ of error before the superior Court. The Court of Error would in that case have had a twofold duty cast upon it: it would have been the duty of the Court to decide upon the validity of the exceptions tendered at the trial, and to allow or disallow the same according to law; and it would also have been its duty, in case any errors appeared upon the face of the original record, to examine such errors, and to reverse or affirm the judgment

of the Court below as the law required. But the Court of Error would have no further duty to perform; it would not have the power to select any particular portion of the evidence set forth in the bill of exceptions, not being the subject-matter of an exception taken at the trial, and to affirm or reverse the judgment of the Court below upon arguments built upon such portion of the evidence alone, or upon consideration of its weight or bearing on the merits of the case. Such course of proceeding and such ground of decision by the Courts, might well hold in the case of a demurrer to the evidence, when each party is content that the whole and every part of the evidence shall be submitted to the consideration of the Court; or to the case of a special verdict, where the facts, not merely the evidence of the facts, are found by the jury for that very purpose; but it is altogether foreign to the object and legal notion of a bill of exceptions, which carries to the Court above the specific exceptions tendered thereon at the trial, and confines the attention of the Court of Error to those exceptions alone; and it would seem unjust to the parties, if the Court were to pronounce an opinion on the whole evidence tated on the record; for that would be to give judgment on facts neither *found* by the jury, nor *admitted* by the party to be true; and besides, it is not certain that *all* the evidence is stated therein which was received at the trial.

Such being the law which governs the consideration of a bill of exceptions in *England*, the question becomes this, whether the Court of Exchequer Chamber in *Ireland* has, under the 28 *G.* 3, c. 31, and 40 *G.* 3, c. 39, a larger power in adjudicating upon a cause brought before it by writ of error after a bill of exceptions tendered, than a Court of Error in *England*

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would have under similar circumstances? and we think it has not.

The object of the Act of 28 G. 3, c. 31, is clearly expressed by the preamble to be, to enable the Court, in which the action is brought, to examine the exceptions to the opinion of the Judge at *nisi prius*, instead of removing the same by writ of error into a superior Court; and for that purpose, the statute enacts that the bill of exceptions "shall be incorporated in the *postea*, and be returned therewith to the Court in which the action was brought, which Court shall have authority to examine the same and give judgment, granting a *venire facias de novo* or otherwise, as shall be agreeable to justice."

Now, in the first place, this statute does not relate to the Court of Exchequer Chamber, but merely gives to the original Court in which the action was brought, the power to deal with a bill of exceptions which it did not before possess: and in the next place, we are of opinion that it gives no authority to that Court to proceed upon any other rule or ground of decision than that which before belonged to the Court and governed the decision upon a bill of exceptions. For the words "to give judgment thereon," mean either for the plaintiff or defendant, according to the merits of the exceptions. The words "to order the judgment to be arrested," mean only in case any matter appears on the record of the action which calls upon the Court so to do; the words "to grant a *venire facias de novo*," mean the ordinary judgment where the exceptions are allowed; and the words "or otherwise as shall be agreeable to justice," mean that the Court shall make any other order which the consideration of the bill of exceptions, as a bill of exceptions, calls upon them by law to make.

And as to the other statute (40 G. 3, c. 39), intituled "An Act for the more speedy correction of erroneous Judgments given in the Courts of Law in this Kingdom," it appears to have been passed for no other purpose and to have no other effect than to abolish the Courts of Error then existing in *Ireland*, and to substitute in their stead a Court consisting of the Chief Justice of the Court of King's Bench, the Chief Justice of the Court of Common Pleas, the Chief Baron of the Court of Exchequer, and the other Justices and Barons, requiring them to meet in a chamber to be called the "Exchequer Chamber," and giving them, or any nine of them, "power and authority to examine such judgments respectively, and to reverse or affirm the same, or to award such judgment as to law and justice shall pertain;" but making no alteration whatever in the law, and giving them no powers with respect to bills of exceptions, other than such as they possessed by law before.

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The first question, therefore, proposed by your Lordships, for the reasons above given, we all agree in opinion is to be answered in the negative.

It becomes therefore necessary that we should consider the second question proposed by your Lordships, "Whether, regard being had to the several facts and exceptions stated in the bill of exceptions, any, and which, of the exceptions is valid?" And for the purpose of answering this question, we propose to take the several exceptions, and state our opinion on each, in the order in which they are found on the bill of exceptions.

The first exception on the part of the plaintiff below, was tendered against the admission in evidence of a parchment writing produced by the defendant below, purporting to be the upper part of the first skin of an indenture, bearing date the 16th of *March*

1st exception.
Part of an
old indenture
relating to
the lands in

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 strument, and
 formerly in
 the custody
 of the Plain-
 tiff's steward,
 until litiga-
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 ceeding stew-
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 tody it is
 produced at
 the trial, is
 admissible in
 evidence
 against the
 Plaintiff, in
 support of
 the case of
 the Defend-
 ant, who de-
 rived title
 from the for-
 mer steward.

1679, which had originally consisted of two more skins, and which appeared to have been severed with a sharp instrument. And we think the question, whether this was receivable in evidence or not, depends upon the consideration whether it came out of the proper custody; and we see no reasonable ground for doubting that the custody of this document was proper before and at the time of its being found. It appears that it had been in the custody of Mr. *Thomas Kemmis*, who had been the steward of Lord *Trimlestown*, and that it continued in such custody until the year 1823, when, after a litigation had begun between Lord *Trimlestown* and Mr. *Kemmis*, this document, with other papers of the *Trimlestown* family, was handed over by Mr. *Kemmis*'s executor to the agent of Lord *Trimlestown*, and at the commencement of 1835 this document was found amongst the other papers so handed over. There seems nothing objectionable in the circumstance of the steward having been made the depository of this document, or of its being delivered out of his custody to that of the succeeding agent, with whom it is found; on the contrary, it would be the most proper custody in which it could be found. And as to the evidence that in 1823 a list of the papers had been made, and that the only entry in such list relating to the parchment writing was written over an obliteration of an entry previously written in the said list relating to another deed; inasmuch as it is left quite uncertain whether that circumstance was the result of an accidental insertion when the list was first made out, or of design, we cannot give such effect to it as to say it ought to prevent the reception of the deed in evidence. Indeed we cannot see what object there could be in making the entry upon an erasure, the more especially as the bill of exceptions states, that enough remains of the former

entry to be legible; and we cannot but think, if any fraud had been intended, the party would rather have written out a new list than allowed the old one to be handed over, bearing this suspicion on the face of it. We therefore think, so far as relates to the question of custody or deposit of this document, it is unexceptionable.

But on the argument of this exception before us, it was also insisted on, on the part of the Plaintiff, that the document could not be received in evidence, on the ground of its mutilation. That objection, however, appears to us rather to be an objection to the weight of the evidence than to its admissibility. There was enough left to show it had been a deed; that it had been executed, and that it conveyed an estate; and by recital therein of the articles of agreement of the date of the 20th of *July* 1668, which had already been put in evidence and read, there appeared enough to show that the deed had been executed in pursuance of those articles of agreement: and the deed being produced in the state in which it was actually found in the custody of an agent of the Plaintiff, mutilated subsequently to its execution, but, when mutilated, by whom, or for what purpose, being left in complete obscurity, we cannot see any legal objection against its being placed before the jury, such as it is; and the rule of evidence that the party against whom a deed is produced has the right to insist that the whole deed shall be read, is not hereby infringed. He has, undoubtedly, the right to insist that no part of the deed, in the state in which it is, shall be kept back from the jury; and the whole was put in evidence upon the present occasion. The weight due to a document in that state of mutilation may be just matter of comment, but at least it appears

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The objection, that a deed tendered in evidence has been mutilated, applies rather to the value of the evidence than to its admissibility.

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2d exception.

If a deed is
 admissible in
 evidence for
 any purpose,
 an exception
 to it ought
 not to be
 allowed.

produced to show that an estate had actually passed by it; which consequence the subsequent destruction of this deed, whether partial or total, would not in any manner affect. We, therefore, think this exception should not be allowed.

As to the second exception against the admission of the conveyance by lease and release of the 8th and 9th of June 1812, by *Nicholas Lord Trimlestown* to *Soloman Richards* in fee, subject to the several leases mentioned in the schedule thereto annexed, the only question is whether it was admissible for *any* purpose connected with the issue between the parties; for if admissible for *any* purpose, the exception ought not to be allowed. Now it would be clearly admissible to prove that the fee-simple was conveyed thereby, if the entail were disbelieved by the jury, or if the entail were cut off, and the lessor of the Plaintiff's case had rested, as it might have done, on his title as heir at law in fee-simple. It operates also as an admission, by the party conveying, of the existence of the several leases enumerated in the schedule. We therefore think this second exception must also be disallowed.

3d exception.

And a similar answer, as it appears to us, must be given to the third exception; the document therein stated being one to which the lessor of the Plaintiff is himself a party, and not appearing to be irrelevant to the matter in issue; its relevancy being shown by the evidence which next follows, and which gave rise to the fourth exception.

4th excep-
 tion.

The fourth exception was taken against the receiving in evidence a bill in Chancery by the administrator, *pendente lite*, of the late *Nicholas Lord Trimlestown*, against *Thomas Kemmis*, as the land and law agent of the said Lord *Trimlestown*; and also against

the answer thereto, and the decree made thereon to account. But we are of opinion that these several documents were receivable in evidence for the purpose of explaining the effect of the agreement under seal of the 12th of *September* 1833, which had been already put in evidence, and to which the lessor of the Plaintiff was himself a party. One of the items in the schedule referred to in the agreement, and already in evidence, is stated to be "Cash to be received by *John Rochfort* from *William Kemmis*, esq., the executor of *Thomas Kemmis*, esq., deceased, by the compromise of the suit of *Rochfort v. Kemmis*." That is the compromise of this very suit in Chancery. The Defendant, therefore, must have the right to explain this item, by the proceedings in the suit which had been so compromised, and to show that the compromise involved an implied ratification by the lessor of the Plaintiff of the sale of the *Roebuck* estate against *Nicholas Lord Trimlestown*, inasmuch as the proceeds of that sale had found their way into the hands of Mr. *Kemmis*, and produced a part of the subject of that suit.

The fifth exception on the part of the Plaintiff relates to the bill in Chancery, filed by the lessor of the Plaintiff against the said *Thomas Kemmis* on the 14th of *October* 1816, which bill the Defendant produced for the purpose of showing the subject-matter of the suit, and that the lessor of the Plaintiff claimed as heir at law of his father the Lord *Nicholas*, and offered to read those allegations therein, but the Plaintiff excepted to the production of the evidence; and we think it is a sufficient answer against the allowance of the exception, that the bill in Chancery, the production and reading of which is now excepted against, had in an earlier stage of the cause been put

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in evidence by the Plaintiff himself; for the bill having formed part of the evidence, the whole was in evidence, and the Defendant might have insisted at the time of its production by the Plaintiff, that the whole should be read, and in consideration and contemplation of law the whole was read. The present exception, therefore, came too late. And we further think the exception, even if the objection already pointed out could be removed, is not pointed to the purpose for which alone it was produced, but is general against its being producible for any purpose, even if any just objection could be made against its application for the purpose intended, of which we are not aware.

6th excep-
 tion.

The sixth exception tendered by the Plaintiff was tendered against the opinion of the learned Judge at the trial, in rejecting evidence offered by him, the Plaintiff, in reply to the Defendant's case. The evidence so offered by the Plaintiff, and rejected by the Judge, was a statement or abstract of the title of *Nicholas Lord Trimlestown* to the manor and lands of *Roebuck*, and which statement or abstract of title contained within it the statement of a deed of the 23d of *March* 1703; the said abstract being offered, amongst other purposes, to show the execution of such deed, and to rebut the presumption of a conveyance or surrender of the life estate created thereby. We think there could have been no doubt but that this abstract would have been admissible against *Thomas Kemmis* in any suit to which he was a party. It was found, at his death in 1823, amongst the other papers of the *Trimlestown* family, which were in his custody as solicitor to the family. It bore, upon several sheets, the handwriting of *Thomas Kemmis*; but it is to be remembered that *Thomas Kemmis* had

parted with all his property in the premises to which the abstract relates, in 1804, when he conveyed to his nephew, the present Defendant, and there is no evidence whatever that the memorandums or statements which were in the handwriting of *Thomas Kemmis* were inserted in the abstract before he had parted with the property. In the absence, therefore, of any evidence *when* such insertion was made, in the possibility that it might have been made a few days only before the death of *Thomas Kemmis*, we think it was not admissible in evidence against the present Defendant, and that it was properly rejected; for we think it clear that *Thomas Kemmis* could not by any statement, either by parol or in writing, after he had parted with his interest, make evidence against the title of the party to whom he had conveyed it.

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The seventh exception relates to the rejection, by the learned Judge, of two pieces of documentary evidence tendered by the Plaintiff by way of reply; viz. a bill in Chancery filed against *Thomas Lord Trimlestown*, by *Thomas Devereux*, in 1780, and the answer of *Thomas Lord Trimlestown* to that bill. This answer purported to state what *Thomas Lord Trimlestown* had heard and believed, that the Lady *Mary Trimlestown*, the mother of Lord *Robert*, had never joined in levying the fines or suffering the recovery which had been levied and suffered by the Lord *Robert*, and that the Lady *Mary* had informed him (*Thomas Lord Trimlestown*) that she had refused to join her said son in levying any fine or suffering any recovery of any of her jointure lands, though often pressed by him for that purpose: and we think the learned Judge rightly rejected this evidence. The first part of the statement of Lord *Thomas* does not relate to the *Roebuck* estate, which alone is in dis-

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 tion.

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 the Judges.

Declarations made by a party in possession of an estate, in his answer to a bill in Chancery, are admissible in evidence against him, and persons deriving from him; but declarations by him of what he heard another person state—not adding that he believed the statement—are not admissible to cut down or defeat his estate.

8th excep-
 tion.

pute, but to certain lands of *New-Haggard*; such part therefore of the statement, even if admissible, is irrelevant to the present inquiry. The latter part, in which he states what he had heard his grandmother say as to her lands in jointure, which may be taken to include the *Roebuck* estate, is open to the objection that it is hearsay evidence only, on a subject upon which that species of evidence is not admitted; and although it is well known that declarations made by a party in possession of an estate are admissible against his own interest, yet no case that we are aware of has established that a declaration by a party in possession, of what he heard another person say (and in this case he does not even go so far as to say he believed what was told him), is admissible to cut down or defeat his estate. If the Plaintiff had offered to prove by any other person that Lady *Mary* had made the declaration above set forth, such evidence would have been clearly inadmissible; and we are not aware of any principle of law upon which it becomes admissible because the statement was made to Lord *Thomas* when in possession of the estate. This exception, therefore, it appears to us, ought to be disallowed.

The eighth exception applies itself to the refusal by the learned Judge to admit in evidence another answer of the said *Thomas Lord Trimlestown* to a bill filed in the year 1787 by *Catherine Preston*; in which answer the said Lord *Thomas* stated that he believed his father Lord *Robert*, on the death of his father, became seised of an estate in remainder in tail male in the *Roebuck* estate, expectant on the death of his mother Lady *Mary*, who he stated he believed had the same for her life, for her jointure. The learned Judge refused to receive, and we think rightly refused

to receive, this evidence; for the Plaintiff had already proved in his own case that Lord *Robert*, on the death of his father in 1746, took as heir in tail male. He had further already given evidence that Lady *Mary*, the mother of Lord *Robert*, was seised of an estate therein for her life. The evidence offered, therefore, was inadmissible in *reply*, so far as it was confirmatory of the Plaintiff's original case; and it was inadmissible for the purpose for which alone it could be offered, namely, for the purpose of *rebutting* the presumption of a surrender of a life estate by the Lady *Mary* before the recovery was suffered (which presumption had been urged on the part of the Defendant), because, as the recovery was not suffered until the year 1747, the evidence offered of the relative interests of Lady *Mary* and Lord *Robert* in 1746 was clearly immaterial, inasmuch as it only applied to the precise moment of the descent to *Robert*. We think, therefore, it was properly rejected.

The ninth exception was taken on the rejection of the record of a special verdict and judgment thereon in the Court of Exchequer Chamber, of *Trinity* term 1783, tendered in evidence by the Plaintiff. It was a judgment in an action of ejectment brought to recover the lands in question, in which *Thomas* Lord *Trimlestown* was the lessor of the plaintiff, and *Joseph Barnewall*, the youngest son of the said Lord *Robert*, was the defendant: and as to this exception, we think it sufficient to observe that this action having been brought against a stranger, the judgment therein is, as between the present parties on this record, *res inter alios acta*; the present Defendant not claiming any estate under *Joseph Barnewall*, against whom the said judgment was given, nor being in any manner privy to the suit.

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Evidence
offered in
reply, to rebut
the case
made by the
Defendant, is
inadmissible
if it is only
confirmatory
of the Plain-
tiff's original
case.

9th excep-
tion.

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10th excep-
 tion.

The tenth, eleventh, and twelfth exceptions relate to the charge made by the learned Judge to the jury.

In the tenth exception, the counsel for the Plaintiff excepts to the learned Judge leaving it as a question of fact to the jury, whether the parchment writing dated the 16th of *March* 1679 was executed by the parties named therein. But if the parchment writing was admissible in evidence at all, and we have already expressed our opinion that it was admissible, we think that the only question which could be left to the jury was precisely that which was so left by the Judge; and that the indorsement on the back, purporting that it had been sealed and delivered, taking into consideration the mutilation of the deed, which had destroyed the seals and names of the parties who had executed it, did *prima facie* import that it had been executed by all the parties thereto. We therefore think this tenth exception ought to be disallowed.

11th and 12th
 exceptions.

And we think neither of the grounds of exception can be justly made to the charge of the learned Judge, which are respectively contained in the eleventh and twelfth exceptions. If the learned Judge had told the jury that, from the facts proved in the case, they were bound to presume a surrender or other conveyance by the Lady *Mary*, the mother of *Robert Lord Trimlestown*, of her life estate; such direction would have been justly objectionable. But he says no more than that they are at liberty to make such presumption; and undoubtedly they were at liberty so to do, if they believed the facts which had been proved, and if they thought those facts warranted the existence of the surrender. And if they did so believe, and did presume that the life estate was in fact surrendered or conveyed, then all difficulty as to the validity of the

common recovery, suffered in 1747, is removed : in that case there was a good tenant to the *præcipe* ; the recovery was a valid recovery. *Robert Lord Trimleston*, who suffered the recovery, acquired thereby the fee ; the leases subsequently made, under which the defendant claims, were valid leases ; and the learned Judge was right in directing the jury, upon such supposition, to find their verdict for the defendant.

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We are, therefore, all of opinion, in answer to the second question proposed by your Lordships, that no one of the exceptions taken at the trial is valid.

Lord *Brougham* :—My Lords, these twelve exceptions, which were argued very fully before your Lordships with the most valuable assistance of the learned Judges, having led to the very clear and distinct opinion which has been given by the Chief Justice of the Common Pleas on the part of himself and his learned brethren, I apprehend your Lordships will now, after the delay which this cause has undergone, feel it right to proceed to give your judgment. I may remind your Lordships that very many of those points appeared to us as the cause went on (and we paid great attention to the exceptions in detail) to be exactly as the learned Judges have described them. I have no hesitation in saying that my mind goes along with the result of the deliberations of those learned Judges. I have only one shadow of doubt ; and I mention it as a very slender doubt indeed, to which I do not mean to say I attach any material weight, regarding the seventh exception.

The seventh exception is upon the ground of the rejection, in evidence, of declarations of the party in possession of the estate unfavourable to his own title, and against the party claiming in right of that title.

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The learned Judges hold that the declaration of a party so in possession would be competent and admissible in evidence against him or his privies, claiming through and under him in that title; yet, that a declaration or statement of a person so circumstanced would not be admissible in evidence if it were only a statement of something which he had heard from some other person, and not of his own opinion of his title. That is the distinction taken by the learned Judges, and it is, no doubt, a very natural distinction, as to the weight rather than the admissibility of the evidence. If it is only a declaration or a statement of what some other person said, a stranger to the title and a stranger to the cause, it might perhaps admit of a doubt whether everything that is said against a man's title, by himself, might not be admissible in evidence, reserving, indeed, a question as to the weight of the evidence, for the consideration of those by whom it shall have to be weighed. I take for granted that the learned Judges have applied their minds, and that they have discussed the question in that view. They have come to this decision unanimously, and apparently without any great hesitation; and I therefore certainly waive any hesitation or doubt which I may feel upon the subject, and am not disposed to quarrel with the opinion they have delivered to your Lordships, or to recommend your Lordships to disaffirm the judgment below, and to give judgment for the Plaintiff in Error, upon that doubt alone. That being the case, my Lords, I certainly, if your Lordships shall think fit, after the delay that has taken place, feel prepared to advise your Lordships to give judgment for the Defendant in Error.

Lord Campbell:—It gratifies me very much to find

that the learned Judges have unanimously given their opinion upon these points in the manner which I had anticipated, and which is in exact accordance with the opinion I had formed upon all these points during the argument. I entirely concur in the opinion which has now been delivered by the Chief Justice of the Court of Common Pleas, both upon the construction of the Acts of Parliament and upon those exceptions.

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With regard to the seventh exception, I must say that I most heartily concur in the opinion of the learned Judges upon that exception; because it seems to me, that although you may admit evidence of what a person in possession has said as to matters within his own knowledge, to cut down the title he has, it would lead to mischievous consequences if you could give in evidence against him and those who claim under him, that which he is said to have heard another person say; because that may be utterly false. He may state something which he has heard another person declare, and which he knows to be utterly false, although in the very same sentence he does not say that it is false. It seems to me, therefore, that the learned Judges have taken the just distinction upon that point, and that the rule which they have propounded to your Lordship will be highly useful with reference to the reception of such declarations in future.

I entirely concur with my noble and learned friend who has now addressed your Lordships, that, if my noble and learned friend on the woolsack is of the same opinion, there is no occasion for further delay in giving judgment in this case.

Lord *Brougham*:—I had no intention of arguing this point. I threw out what occurred to me during

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the argument at the bar in the presence of the learned Judges. Of course I did not mean that I had the least doubt that, what another person might say against the title and which might be known to the owner at the time that he made the declaration or statement to be false, that of itself was not admissible evidence. But the way in which it occurred to me was, that a person stating what he knows or thinks to be against his title, is evidence against him and against those claiming under him. A person stating what another person has said against his title, and not at the same time denying it, appears to me to leave a doubt whether he has not, by stating it, shown that he considered that there was something in it; but I do not quarrel with the law as laid down by the learned Judges.

The *Lord Chancellor*:—I beg to state that I entirely concur in the opinion which has been delivered by the learned Chief Justice, and I agree with my noble and learned friends who have proposed that your Lordships should now give judgment for the Defendant in Error.

Lord *Brougham*:—We all feel how greatly obliged we are to the learned Judges for their assistance in this case, which has been one of great labour and anxiety; and how admirably the learned Chief Justice, as he always does, has given the opinion of his learned brethren, in a manner which is certainly calculated to be of great use in the law.

Mr. *Kelly* reminded their Lordships, with regard to the question of costs, that inasmuch as the Court below decided this case upon the preliminary point,

and gave no judgment upon the several exceptions, it was necessary, in order to obtain judgment upon the exceptions, to come before this House upon the general appeal. He threw that out for their Lordships' consideration, because judgment had now been given in favour of the Plaintiff in Error upon that preliminary point.

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Lord *Brougham*:—I am inclined to think that it is not a case for costs.

The other Lords present concurred in that view.

It was accordingly ordered, that the judgment of the Court of Exchequer Chamber in *Ireland*, affirming the judgment of the Court of Common Pleas there, be affirmed, &c.

(The omission in this order of any judgment upon the question of costs, left the parties to pay their own costs respectively.)

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Feb. 20, 21.
27, 28.
March 6.

THE HOUSEHILL COAL AND IRON } *Appellants.*
COMPANY and Others - - -

JAMES BEAUMONT NEILSON and } *Respondents.*
Others - - - - -

Invention.
Patent.
Evidence.
Practice.
Stat. 5 & 6
W. 4, c. 83.

A PERSON, to be entitled to a patent for an invention, must be the *first and true* inventor; and there must not be any public use thereof by himself or others, prior to the granting of the patent.

Trials of an incomplete invention, by way of experiment, are not evidence of "prior use" for the purpose of invalidating a patent. Prior use, for that purpose, means public use and exercise of the invention.

Evidence of the existence of a completed invention, once in public use, although abandoned or the use long discontinued but not altogether lost sight of, is sufficient to invalidate a patent subsequently granted for the same invention.

HELD, therefore, that on the trial of an issue "whether an invention described in a patent is not the original invention of the patentee," it is an erroneous direction in law to the jury to charge them that the evidence of prior public use, to invalidate the patent, must show that "the use was continued to the time when the patent was granted; not to the very exact period, but that it must have been known and used as a useful thing at the time."

If, upon a bill of exceptions to the Judge's charge to the jury, the superior Court see that there was a misdirection calculated to mislead the jury in their verdict, the Court has no discretion, but must allow the exception and direct a new trial, even though the verdict may be right. *Secus*, in case of a motion for a new trial on the ground of misdirection.

The 5th section of the Act 5 & 6 W. 4, c. 83, requiring a defendant to an action for infringing a patent, to give the plaintiff notice of the objections on which he means to rely at the trial, does not apply to *Scotland*; the practice there, of confining the evidence at the trial to the averments on the record, being a sufficient protection against surprise.

HELD, that the want of such averments on the record, cannot be supplied by a notice of objections lodged in process.

THE Respondent, *James Beaumont Neilson*, of *Glasgow*, engineer, obtained, in the year 1828, letters-patent securing to him, his executors and assigns, the exclusive privilege of using and vending

in *Scotland*, for 14 years, his “invention for the improved application of air to produce heat in fires, forges, and furnaces, where the bellows or other blowing apparatus are used ;” and by deed of assignment, dated *March* 1830, he communicated a joint interest with himself in the patent to three persons represented by the other Respondents. The principle of the invention, according to Mr. *Neilson’s* specification, consisted in the application of heated atmospheric air to fires and furnaces ; and the mode of carrying that principle into operation was by heating the air, while under blast, in a separate air-vessel placed between the blowing apparatus and the furnace. The air-vessel—made of iron or other metal, sufficiently strong to endure the blast from the blowing apparatus—to be air-tight, except the apertures for the admission and emission of the air ; and to be heated to a high degree of temperature by a fire distinct from the fire to be affected by the blast or current of air.

In *October* 1840, the Respondents, finding that the Appellants were using, at their iron-works at *Househill*, without license, a process of applying heated air to their furnaces, the same or similar to that described in the letters-patent, applied to the Court of Session for suspension and interdict to restrain them from using it, and raised an action for damages against them for the injury sustained by the alleged encroachment on the patent. The two processes were then conjoined, and a record was made up, in which the Appellants—in their answers, first to the bill of suspension, and afterwards to the action—averred, among other things, that the application of heated air to fires and furnaces, to produce a more intense heat and combustion, was known and publicly practised prior to the date of *Neilson’s* patent, more particularly by the invention of Mr. *George Chapman*, of *Whitby*, in

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1825; that the application of atmospheric air, heated beyond its ordinary temperature, to promote combustion in smelting furnaces, or in the smelting of ores and metals, was known and practised prior to the date of the patent, both in *England* and *Scotland*, particularly, among others, by the late Mr. *Dawson*, of *Low Moor* iron-works, in *Yorkshire*, by Mr. *Wilkinson*, of the *Bradley* iron-works, in *Staffordshire*, and also at *Horsley* iron-works, in that county; and that the same process was described in a treatise published by a Mr. *Saddler*, in *Nicholson's Journal of Natural Philosophy* for *April 1798*, intitled "Description of an apparatus for disengaging oxygen-gas and applying it to the best advantage; to which are added, Observations on the blow-pipe by *W. Nicholson*." They also referred to the patent obtained by the Rev. Mr. *Stirling*, of *Kilmarnock*, in 1816, and to a patent obtained by Mr. *Botfield*, of *Shropshire*, in 1828; and further averred, that Mr. *Jeffries*, of the *Grove foundry, Southwark*, in 1825, invented a mode of applying heated air in its transit in pipes placed in a charcoal fire, for the purpose of producing a more intense degree of heat in the smelting of iron ores.

The following issues for trial by a jury were approved of by an interlocutor of the 27th of *January 1842* (a): "Whether in the course of the year 1840, and during the currency of the said letters-patent, the defenders did, in or at their iron works at *Househill*, by themselves or others, wrongfully and in contravention of the privileges conferred by the said letters-patent, use machinery or apparatus substantially the same with the machinery or apparatus described in said specification, and to the effect set forth in the said letters-patent and specification; to the loss, injury, and damage of the pursuers?" Or.

(a) 4 Bell, M. & D. 470.

“ 1. Whether the invention, as described in the said letters-patent and specification, is not the original invention of the pursuer, *J. B. Neilson* ?

“ 2. Whether the description contained in the said specification is not such as to enable workmen of ordinary skill to make machinery or apparatus capable of producing the effect set forth in the said letters-patent and specification ?

“ 3. Whether machinery or apparatus constructed according to the description in the said letters-patent and specification, is not practically useful for the purposes set forth in the said letters-patent ?”

After the issues were adjusted, but before the record was closed, the Appellants gave the Respondents notice of a note of objections lodged by them in process, and that, besides denying that they had infringed the patent (as they had before denied on the record), they intended at the trial to rely on those objections (*b*). This note of objections, after setting forth the various instances of prior use before averred on the record, further added, “that application of atmospheric air beyond the ordinary degree of tem-

(*b*) It appeared that this note of objections was lodged in a mistaken compliance with the fifth section of Lord Brougham's Act (5 & 6 W. 4, c. 83, “*An Act to amend the Law touching Letters-patent for Inventions*”); by which it is enacted, “That in any action brought against any person for infringing any letters-patent, the defendant on pleading thereto shall give to the plaintiff, and in any *scire facias* to repeal such letters-patent the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice: Provided always, that it shall and may be lawful for any Judge at chambers, on summons served by such defendant or plaintiff on such plaintiff or defendant respectively, to show cause why he should not be allowed to offer other objections whereof notice shall not have been given as aforesaid, to give leave to offer such objections on such terms as to such Judge shall seem fit.” But it seems this section of the Act does not extend to *Scotland*; vide *infra*, p. 811.

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perature, to facilitate the smelting of iron and other ores, was known and publicly practised in *Scotland* and *England* prior to the date of the said patent, particularly at *Irvine, Greenock, Glasgow*, and various other places in the counties of *Ayr, Renfrew, Lanark*, and *Mid-Lothian*, and also at *Liverpool, London*, the *Bradley* and *Horsley* iron-works in *Staffordshire*, and the *Low-Moor* iron-works in *Yorkshire*; by various iron-masters and iron-founders, anchor-smiths, and other persons engaged in the smelting and manufacture of iron." The note also stated numerous objections to the title and terms of the patent, and to the specification thereof.

On the trial of the issues before the Lord *Justice-Clerk*, both parties produced a large mass of evidence, and the jury found for the Respondents on all the issues (c).

The Appellants gave notice of motion for a new trial; but abandoning that motion, they presented a bill of exceptions, of which there were 13, the first being to the learned Judge's rejection of evidence, the others to his Lordship's directions to the jury. The bill of exceptions, having been signed by the Lord *Justice-Clerk*, came to be argued before the Lords of the Second Division of the Court of Session; who, by an interlocutor of the 20th of *July* 1842, disallowed all the exceptions, with expenses to the Respondents (d).

The appeal was against that interlocutor, and also against the interlocutor of *January* 1842, approving of the issues; but the objections to the latter were abandoned at the hearing of the appeal, and the arguments for the Appellants were principally applied to the first and eleventh exceptions.

(c) 4 Bell, M. & D. 1187-1215. (d) 5 Bell, M. D. & Y. 86.

The first exception was to the ruling of the Judge, in rejecting a witness tendered by the Appellants, to prove the use, about 20 years ago (long prior to the date of the patent), at an anchor-smith's forge at *Irvine*, of a pipe heated between the hand-bellows and forge, in order to produce more intense heat in the forge. The Respondents' counsel objected to that evidence, and generally to that line of inquiry, on the ground that no sufficient notice of it was given to them by the averments on the record.

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The Lord *Justice-Clerk* sustained the objection on three grounds:—1st, that the note of objections lodged in process did not supply defects of averments on the record, supposing that that note contained such averments as would be necessary on the record to let in this evidence; 2d, that no notice was given on the record of this line of inquiry, or of prior use of the invention at a smith's forge in *Irvine*; and 3d, that in an inquiry as to prior use of an invention, by instances of the practices of persons for 20 years, it is essential to the interests of patentees and to the ends of justice, that the record should contain such information as would enable the patentee to meet such cases, by previous inquiry into the purposes and objects of the practices to be proved against him, in which the prior use of his invention may be alleged to be found.

The eleventh exception was to the learned Judge's charge and direction in point of law to the jury, on the evidence of some of the Appellants' witnesses, who stated, in substance, that, about 42 years ago, they were employed at the *Bradley* iron-works, in *Staffordshire*, then belonging to a Mr. *Wilkinson*; that he had blast-furnaces and blowing apparatus from a blast-engine; that there was a cylinder heated, through

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which air passed before it got to those furnaces; that the object of putting air through the cylinder was to heat it; that the effect on the furnaces was to make the iron too rich or too good — good for small castings, but not good for malleable iron; that it (the cylinder) was used for about three months in these furnaces, and then put to a finery; that it was used there for three months more, then given up again; and they blew the same cylinder with cold air, never heated air, after being satisfied it would not do.

The Lord *Justice-Clerk*, with reference to that line of evidence, told the jury thus:—"The second direction in point of law which I have to give you in this issue (the first issue in the alternative) respects what is prior use, so as to destroy the invention. This is what the defenders must prove; that it was not new in respect of the public use and exercise thereof in this kingdom. The question in each case is a matter of fact for the jury, but this is in point of law the sort and kind of use the existence of which a jury must find to be proved, in order to warrant them to find against the patentee. Great utility is one important element in the question of novelty; for if the process is of great, manifest, and immediate utility, that is of the utmost importance to the point. Could this have been previously in public use and exercise without clear and abundant proof? The cases referred to at the bar have settled that the use must be public use; that the existence and trial of regular machines of the very same sort, if abandoned, if not used and introduced into practice, is not public use and exercise thereof in the kingdom. In the case of the suspension principle of wheels, it was well stated by Mr. Justice *Patteson* to the jury who tried that case"—His Lordship having read the charge of Mr. Justice

Patteson in the case of *Jones v. Pearce*, as reported in Mr. *Godson's* book on Patents, p. 46 (2d edit.), and also a passage from Lord Chief Justice *Tindal's* charge to the jury in *Cornish v. Keene*, from a note p. 44 of Mr. *Webster's* Cases, proceeded:—"You will observe that it is settled that the trials founded on as proofs of prior use, 1st, must have been public; 2d, must have been continued, not abandoned; 3d, must have continued to the time when the patent was granted: I do not say to the very exact period, but it must have been known and used as a useful thing at the time. The abandonment of trials as not successful or satisfactory, is a decided proof that the invention was not turned to account for public utility, and was not in public use and operation."

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The eleventh exception of the Appellants was to this charge, in so far as the Lord *Justice-Clerk* directed the jury in point of law that "the proof of prior use of the patent invention must not only be public, but must have been continued, not abandoned, and must have continued to the time when the patent was granted; not to the exact period, but it must have been known and used as a useful thing at the time."

The *Attorney-general* and the *Lord Advocate* (with whom was Mr. *Kelly*), for the Appellants:—The eleventh (e) exception must be allowed, whatever may be the decision of the House on the other exceptions. This case is of great importance, not only on account of the amount of property, but also on account of the principle involved in it, there being about 20

(e) The arguments on the first exception, relating to the practice of pleading in the *Scotch* Courts under the Judicature Act, 6 G. 4, c. 120, s. 8, and the relative acts of *sederunt*, are given by Mr. *Sidney Belk*, in his report of this case, 2 Vol. 1.

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actions pending on the validity of the patent, and a proceeding also in the Court of Chancery to set it aside. It is quite clear that the Lord *Justice-Clerk* misdirected the jury on the law as to the proofs of prior use. His Lordship went on an erroneous view of the law, being either misled by, or mistaking the effect of, the words of the charge of Mr. Justice *Patteson* in *Jones v. Pearce*, of which there is no report except in Mr. *Godson's* book on Patents (see 2d edit. pp. 28, 46, & 190). His Lordship says, first, "that prior use must be public; secondly, that it must be continued, not abandoned," raising a distinction between a thing that is continued and a thing that is not abandoned, and putting continuance in contradistinction to abandonment of the use; "and thirdly, that it must have continued to the time that the patent was granted; that it must have been known and used as a useful thing at the time." Now, whatever authority may be given to the charge of Mr. Justice *Patteson* in respect to Mr. *Strutt's* wheel, the words ascribed to that learned Judge give no sanction for the latter part of the Lord *Justice-Clerk's* direction here, that the use must have been continued and known and used as a useful thing at the time of the granting of the patent. Mr. Justice *Patteson's* charge to the jury proceeded on the view that Mr. *Strutt's* application of his wheel was a mere experiment, proving it to be useless, and that the invention covered by the patent in that case remedied the defects of Mr. *Strutt's* wheel; whereas the charge here excepted to would go to shut out parties from proceeding on the public use of a thing, which is not an experiment, nor abandoned, but of which the use had been discontinued a short time before the patent was granted.

That charge goes far beyond the charges of the *English* Judges cited as authorities for it, and receives no sanction from them. There may be many inventions that are not used as useful at the time when a patent is granted, and which are neither useless, nor experiments, nor abandoned. The use of them may be suspended or superseded by other apparatus coming in their place and supplanting them for many years, but still not abandoned as useless. Suppose that an invention, known and in general use as useful, is put away or superseded by something better, and that after some years that something better can be no longer used, for want, suppose, of funds, or by the breaking out of a war, or other cause, can it be maintained that another party is entitled to a patent for the thing before left off, merely because it was not publicly used at the time the patent was granted? The question is, who is the true and first inventor? If the entire invention is stated in a book or newspaper, without any use of it, that is quite sufficient to prevent the patentee from having the exclusive use of it. The part of the statute of *James* relied on by the Respondents must be read in connexion with the condition of the letters-patent, viz. "that if the invention is not a new invention as to the public use and exercise thereof," then the privilege shall cease. No patent can be good, if it be shown that what is claimed under it was brought into public use before the patent was applied for (*f*).—[Passages were read from the short-hand writer's notes of Lord *Abinger's* charge to the jury in the case of *Carpenter v. Smith*, which came afterwards before the Court of Exchequer (*g*).]

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(*f*) Godson on Patents, 45. 194. 275 ; and see Lord *Brougham's* Act, 5 & 6 W. 4, c. 83, s. 2. (g) 9 M. & W. 300.

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Mr. *Rutherford* and Mr. *Pemberton*, for the Respondents:—There are no grounds for maintaining, on the evidence before the jury in this case, that the Respondents' patent is void for prior use; and the Judge's direction to the jury on that evidence was studiously cautious and perfectly correct. The Appellants' counsel seem to overlook the distinction between the objections to a patent founded on prior use, and on the want of originality in the alleged invention; and confounding things perfectly distinct, they deduce from the false premises the supposed absurdity that a patent may be obtained for a machine publicly known and used for many years, but allowed to go into disuse from accidental circumstances. The fallacy of this argument is apparent. Such circumstances may affect the patent in respect that the patentee was not the true and first inventor: it would be for the jury to say, under the circumstances, whether he was entitled to that character.

It is provided by the statute 21 *James*, c. 3, sect. 6, "that any declaration before mentioned shall not extend to any letters-patent, &c. hereafter to be made of the sole working, &c. to the true and first inventor of such manufactures, *which others at the time of making such letters-patent and grants shall not use.*" There are three conditions on which the Crown, under this statute, grants patents: 1st, that the patentee shall be the first and true inventor; 2d, that at the date of the patent the invention shall not be publicly used by others; and 3d, that the grant shall not be contrary to law. The first and second conditions, of the originality of the invention, and the non-use of it in public, are totally distinct. The words "*which others at the time of making such letters-patent and grants shall not use,*" show that the time to which prior use

refers, is the time of granting the patent, and not any remote prior period. Similar expressions are used in a previous section of the Act, and are construed in the same manner. That construction of the statute is supported by Mr. Justice *Patteson*'s charge in the case of *Jones*'s patent, that if it appeared on the evidence that the wheel constructed by Mr. *Strutt* in 1814, was in substance the same as that for which *Jones* got the patent, "and that if it (*Strutt*'s wheel) was used openly in public, and that the same continued to be used up to the time of taking out the patent, that would be a ground for saying that *Jones*'s wheel was not new. But if it appeared that Mr. *Strutt*'s was an experiment, and that he, finding it did not answer, ceased to use it altogether, and nobody else followed it up; and that the plaintiff's invention, which came afterwards, was his own, and remedied the defects of *Strutt*'s wheel, although he knew nothing of it; then there was no reason for saying the patent was not good." Lord Chief Justice *Tindal*, in *Cornish v. Keene* (as reported by Mr. *Webster* in his book on Patents, p. 137, and in a note to his Cases, p. 44), directed the jury "to say whether the invention was or was not *in public use and operation at the time the patent was granted*." Looking to these high authorities, as well as to the enactments of the statute of 21 *James* 1, no one can doubt that the direction of the Lord Justice-Clerk laid down the law correctly in holding that the prior use of an invention, in order to set aside a patent, must be public and well known,—not merely an experiment and abandoned,—and known and used at or about the time when the patent was granted.

The *Lord Advocate* replied.

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The *Lord Chancellor* :—The principal question in this case arises out of the eleventh exception. The learned Judge stated to the jury what he considered to be sufficient evidence to support prior use, so as to invalidate the patent. The learned Judge expressed himself in these terms :—" You will observe that it is settled, that the trials founded on, as a proof of prior use, must have been public; must have been continued, not abandoned; must have continued to the time when the patent was granted; I do not say to the very exact period, but it must have been known and used as a useful thing at the time."

The first question that arises upon this charge, is what the learned Judge meant by the word "trials." That word, as I understand it, does not in that passage import experiments going on for the purpose of concluding or perfecting the invention. But I understand the word "trials" to have been used in a different sense. It could not have been used in the former sense; for this reason, that the distinction which the learned Judge draws—and draws with so much pains and so much care—could not have applied to that meaning of the term "trials;" because, if they were mere trials and experiments in the progress of the invention, it was wholly immaterial whether they were continued or whether they were abandoned, because in neither case could they have been made use of as evidence of prior use for the purpose of invalidating the patent.

It becomes necessary, therefore, from the context to consider what it was that the learned Judge meant by the word "trials;" and I think that sufficiently appears by a reference to the former passage, which former passage, indeed, is only separated from the passage in question by the two cases to which the

learned Judge refers: he says, "The cases referred to at the bar have settled that the use must be public use; that the existence and trial of regular machines of the very same sort, if abandoned, if not used and introduced into practice, is not public use and exercise thereof in the kingdom." Then, after stating the two cases, he goes on thus:—"You will observe that it is settled that the trials founded on as a proof of prior use, 1st, must have been public; 2d, must have been continued, not abandoned; 3d, must have continued to the time when the patent was granted." He is, therefore, obviously speaking of the same trials to which he had before referred, namely, trials of regular machines of the very same sort; and he says, those trials of regular machines of the very same sort, if abandoned, will not be evidence of public use; and that he so meant is quite obvious, also, from the concluding part of the sentence, where he says, "but it must have been known and used as a useful thing at the time." What is the meaning of that? The invention must have been known and used as a useful thing at the time. So that I understand the proposition of the learned Judge to be this, that if the machine had been made and had been put in trial, unless those trials had gone on and the machines had been used up to the time of the granting of the letters-patent, it would not be evidence of prior use, so as to invalidate the letters-patent.

Now I am obliged to say, with all deference to the learned Judge, and with all respect for the learned Judges of the Court of Session, that I think in that respect they are mistaken; and that, if it is proved distinctly that a machine of the same kind was in existence and was in public use, it is not necessary that such use should come down to the time when the patent was granted; if it was used and the use

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was discontinued, still that is sufficient evidence in support of the prior use, so as to invalidate the letters-patent.

Now, my Lords, it appears to me that the learned Judges in the Court below were misled by the two cases that were cited by the learned Judge who presided at the trial. There is an expression supposed to have been made use of by Mr. Justice *Patteson* at a trial at *Nisi Prius*, upon which reliance was placed, reported, I think, in Mr. *Godson's* book. Whether Mr. Justice *Patteson* did really make use of that expression or not, I have no means of knowing. But afterwards, when the case of *Carpenter v. Smith* came before the Court of Exchequer, and reference was made to that passage in the summing up of the learned Judge to whom I have referred, Mr. Baron *Alderson*, apparently with the assent of the rest of the Court, commented upon that observation, dissenting from the position, and expressed an opinion that that learned Judge, if he had so expressed himself, had expressed himself incorrectly in point of law (*h*).

Again, in the other case (*Cornish v. Keene*) which has been referred to, which is also a *Nisi Prius* case, at which the Chief Justice of the Common Pleas presided, similar expressions are imputed to him. But in a subsequent stage of *Cornish v. Keene* (*i*), when it came before the Court of Common Pleas, the Judges took time to consider their judgment, and the learned Chief Justice afterwards, pronouncing the opinion of the Court, did not state the position in those terms, but said, that if before the granting of the letters-patent the machine had been in use, that was prior use sufficient to invalidate the letters-patent; and it was not necessary that the contrivance or the machine

(*h*) 9 M. & W. 303.

(*i*) 3 Bingham N. C. 570; 4 Scott, 337.

should be in use up to the time of the letters-patent. If it is discontinued, provided it has been once in public use, and the recollection of it has not been altogether lost; if it has been once publicly used, that will be sufficient to invalidate the letters-patent, although the use may be discontinued at the time when the letters-patent were granted.

Now, my Lords, I apprehend that that is the law, and the known law, upon the subject in this country. I never heard it before questioned, that the notorious public use of an invention before the granting of letters-patent, though it may have been discontinued, is sufficient to invalidate the letters-patent.

Then, the remaining question for our consideration is this, and it is an important one; whether, if the learned Judge laid down the law incorrectly to the jury, this was calculated to mislead the jury in the verdict they were to pronounce? Now I apprehend that in this case it was eminently calculated to mislead the jury, and for the reasons which I am about to state. The question related to the proceedings that had taken place at the *Bradley* iron-works. It was contended that a machine similar to that of the plaintiff's had been publicly used at those works; and another point was raised also, as to whether or not it was a mere experiment, or the actual use of a complete machine. Now it is quite obvious that as these were points for the consideration of the jury, the jury were liable to be misled, and greatly misled, by the summing up of the learned Judge, for the reason which I am about to state. When they retired for consideration, they would naturally say, "It is a question for our consideration whether this machine used at the *Bradley* works was a machine similar to that of the plaintiffs. And another con-

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sideration that we have before us is this; was that machine simply in the course of experiment, or was it a complete machine?" In order to disentangle themselves from the difficulty of deciding this question, they might immediately have said, and they would naturally have said, "It is quite immaterial for us to consider those points, because as that machine was afterwards discontinued, the learned Judge has told us that, although we should be of opinion that the machines were the same, although we should be of opinion that the machine was not merely in the course of invention, but that it was completed for the purpose of practical use; yet the learned Judge has told us that unless that use has come down to the time, or about the time, of granting the letters-patent, it cannot be made use of as prior use for the purpose of invalidating the letters-patent. It is unnecessary, therefore, for us to consider those points." That would have been the natural course which the jury would have taken; therefore it is perfectly obvious that, if the learned Judge be incorrect in the manner in which he stated the law in the particular which I have stated, it was calculated to mislead the jury.

Now, my Lords, if this was a motion for a new trial, having read the evidence and having attended to the record, I really for one should feel strongly of opinion that we ought not to have disturbed the verdict, for I think the verdict is supported by the evidence. But when we come to consider a bill of exceptions, we are bound to take a different view of the subject; and if we are of opinion that the law was laid down incorrectly, and if we are of opinion that the jury may have been misled, we have no discretion to exercise; we are bound to say, under such circumstances, that the exception must be allowed.

Under these circumstances, I am of opinion, for the reasons which I have thus shortly stated, that the eleventh exception ought to be allowed.

With respect to the other exceptions, first, as to the first exception ; I am quite satisfied by the arguments at the bar, that the learned Judge did right in refusing to admit the evidence.

The arguments at the bar have satisfied me, that, according to the law of *Scotland*, and according to the course of proceeding in *Scotland*, the Judge in that respect was correct. And with respect to the other exceptions, the eighth and ninth, it is unnecessary for me to enlarge upon them, because my noble and learned friends who are near me, and myself, expressed our opinions upon those points in the course of the argument, and I understood that they were ultimately abandoned by the learned counsel.

Under these circumstances, I should recommend your Lordships to allow the eleventh exception, and to disallow all the rest.

Lord *Brougham*:—I entirely agree in the view taken, and for the reasons so luminously expressed, by my noble and learned friend on the woolsack, that the exceptions, all but the eleventh, were properly disallowed by the Court before whom the bill was brought, and that your Lordship should disallow those exceptions here, affirming the judgment below ; but I also entirely concur with my noble and learned friend that we have no choice here but to allow the eleventh exception.

This is, as my noble and learned friend has justly remarked, another case than that of an application for a new trial, and other discretion within other bounds alone remains to us to exercise. If we are of opinion,

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first, that the law has been mistaken, and, under a misapprehension of it, it has been erroneously delivered by the Judge to the jury; and if we are, secondly, of opinion that the misdirection in point of law, the mistake in point of law, committed by the learned Judge, had a direct tendency, I may almost say an inevitable tendency, to mislead the jury in the conclusion to which they should come and in the verdict which they should deliver, then, my Lords, both of these questions being answered in the affirmative, that the law was mistaken, and that the mistake tended to mislead the jury in their verdict, we have no choice, but must allow the exception.

Now, my Lords, a more important mistake, in point of law, your Lordships will give me leave to say, could not possibly have been made by the learned Judge than that into which the learned Judge fell upon the present occasion. And I will not allow it to be said for one moment, in dealing with this question, that there is anything doubtful, that there is anything speculative, that there is any new law to be laid down, or even any new topics in respect of the law, about to be broached here in dealing with the direction of the learned Judge; for I speak with all possible respect for that learned Judge's great ability and experience in his profession in *Scotland*, when I say that this law which has been mistaken here by his Lordship is a matter of as perfect certainty, as thoroughly known, and as little drawn into doubt in *Westminster Hall*, where the law is administered touching the construction of the statute of *James*, the Patent Act, as any one branch of the law most commonly known and most frequently administered by our Courts.

The mistake into which the learned Judge fell, and

in which he was followed by his brethren of the Second Division, appears to me to have arisen from this: the Patent Act contains two exceptions; the proviso under which the monopoly is allowed to be granted, notwithstanding the statute prohibiting all monopolies for the future, saves to the Crown the power formerly general, and now become limited by force of the Act, in two cases alone. In cases of invention, the patent right, the monopoly, may be granted by the Crown to a person, provided first he be the first and true inventor; and provided, secondly, that at the time of the grant of the monopoly of the patent, others shall not have used the same. Consequently, observe the result: if either he is proved not to be the true inventor, or if, being the true inventor, nevertheless it be proved that there has been an user by others at the time of the patent, in either the one case or the other, the right flies off: the condition does not attach, which condition precedent must have existed in both those particulars to enable the Crown to come within the benefit of the proviso, and to be saved from the prohibition of the Act against all future grants of monopoly.

Now the Court below never seems to have kept those two conditions distinct, which are perfectly distinct in their own nature; for a person may be disentitled to a patent, who is the first inventor, on account of user at the time; or he may be disentitled to a patent, though not used at the time, if he was not the first inventor: both titles must concur.

Now see how this mistake with respect to the abandonment and continuance got in through the door which I have just shown your Lordships the Court allowed to be left open for error creeping in. If an invention has not been completed, but if it all rests in

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experiment and trial, then it is a most material circumstance as a test whether any given act of a party other than the inventor, was trial or complete invention. It is a most salutary and important test to apply with a view to ascertain that, to see whether he abandoned it or continued it; if he abandoned it, if he gave it up altogether, and for 20 or 30 years did nothing, it is a very strong presumption that it was only experimental, not an invention completed. But suppose it was complete, and suppose it is admitted not to have been a trial; suppose it is allowed to have been an invention executed, if I may so speak, not merely executory, or not merely in the progress of invention, but an invention completed,—then it is one of the greatest errors that can be committed in point of law, to say that with respect to such an invention as that, it signifies one rush whether it was completely abandoned, or whether it was continued to be used down to the very date of the test of the patent: provided it was invented and publicly used at the time, 20 or 30, or, as in this case, 40 years ago, it is perfectly immaterial; not immaterial to the second question, arising upon the second condition, namely, whether it was used or not at the time of the granting of the patent, but totally immaterial to the other question, which is equally necessary to be ascertained in the inventor's favour, whether or not he was the first and true inventor; for he must be the first and true inventor, as well as the only person using it at the time; otherwise he is not entitled to the letters-patent. Herein precisely lies the error which has been committed by the learned Judge; he dwells upon that as if it were material in both cases; that is to say, to the question of first and true inventor to which it is not material, as well as to the question of user at the time, to which it is material.

I entirely agree with my noble and learned friend in considering that there can be no doubt, that in using the word "trial" here, the learned Judge does not mean it as experiment; because, previously, just before the two cases are cited, he speaks of the "existence and trial" of machines of the very same sort, and then he makes his observations upon it. Now "existence" implies invention; "trial" there, is rather use than experiment; and all that passage of the learned Judge's charge, taken with what follows after citing the two cases, and somewhat misunderstanding the import of the two cases, clearly relates to invention executed and completed.

My Lords, it is always a dangerous thing, in applying a *Nisi Prius dictum*, to take that *dictum* as law, when it goes against the known law laid down in cases in Banc, which has received the full consideration of the several Courts before whom the question arose; but it is still more dangerous, when we are dealing with the law of another country, to rely upon the chance *dicta* of Judges at *Nisi Prius*; but it is most of all perilous, and most of all apt to lead Judges into mistakes, if they rely upon a report not in any of the regular term reports, or even *Nisi Prius* reports, but in some work, though of a learned person, yet who quotes it without authority; because it is very possible that there may have been a misapprehension of what fell from the learned Judge; and that possibility becomes a high probability, when it turns out to be inconsistent with the reason of the case, and with other known authorities in the regular sources from which you obtain accounts of what has passed before the learned Judges.

My Lords, I doubt very much whether that fell from Mr. Justice *Patteson* which has been stated. If it did, it has been negatived, with the assent of the Court

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of Exchequer, by what fell from Mr. Baron *Alderson* when the subject was mentioned in *Carpenter v. Smith*. As to what is supposed to have fallen from Lord Chief Justice *Tindal* also at *Nisi Prius*, I have the most positive and indisputable authority to state that the law as laid down now by the Lord Chancellor in his judgment, and as I have now stated my opinion upon it also, is—notwithstanding what is supposed to have fallen from the learned Chief Justice—the clear and undoubted law upon the subject; that it is so in the opinion of the learned Chief Justice himself; it is a thing that will not admit of dispute; that it is an unquestionable position, as to which no doubt whatever can be entertained; and I believe he would express himself as much astonished at ever having heard of its being doubted, as I have done in the course of the observations which I have taken leave to submit to the House.

All these matters being duly taken into consideration, and there being in my apprehension no kind of doubt that the jury upon the trial would say, “Why should we consider whether it was used at the *Bradley* works or not? Why should we consider whether it was a trial or a completed invention? Be it so, that it was used 40 years ago; be it so, that it was a complete invention; we hear the learned Lord *Justice-Clerk* telling us that we need not trouble ourselves upon these points, for it is enough for us if it was abandoned; and that takes the facts out of the case, and leads us to find a verdict the other way:”—upon these grounds we have no choice in this application, it being a bill of exceptions. We have no hesitation in saying that the law was misconceived and misstated to the jury. The law is undeniable; it is a matter of no doubt or hesitation among any men in this country, who have been accustomed to admi-

nister it, or, I will venture to say, with any practitioner whose opinion is entitled to any weight; and I am also of opinion that the law so laid down tended to mislead, and must necessarily have tended to mislead the jury. Upon these grounds I have no hesitation in supporting the proposition of my noble and learned friend, that this eleventh exception must be allowed.

I ought to apologize to your Lordships, after the very luminous statement of opinion (in which I entirely agree, as well as in the reasons for it) of my noble and learned friend the Lord Chancellor, for having occupied so large a portion of your time in adding the small weight of my opinion to his; but I deemed it necessary upon this account, that it might clearly appear to practitioners here as well as elsewhere that no doubt whatever has been entertained upon the subject, and also that it might appear in what way the error crept into the very learned and able Judge's directions to which I have adverted.

Lord *Campbell*:—My Lords, this case has been treated so copiously and lucidly by my noble and learned friends who have preceded me, that I shall occupy but a very few moments of your Lordships' time in offering a very few observations upon it. I entirely concur in the opinion that has been expressed upon the first exception; I think that the learned Judge was perfectly justified and bound at the trial to reject the evidence which was rejected. It seems to me that that section of the recent Act of Parliament about giving notice, does not apply to proceedings in *Scotland*.—

Lord *Brougham*:—Clearly not.

Lord *Campbell*:—There are other sections of the Act of Parliament that apply to *Scotland*, but I

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think that this does not. The language employed shows that it was not so intended; and there was this plain reason for abstaining from carrying into *Scotland* that provision; namely, that the law of *Scotland* required no such amendment, because, by the very salutary practice prevailing in that country, there is no danger of surprise, the condescendence and the statement upon the record being to be looked at as confining the general issue that might be granted to try the merits of the question. I am, therefore, clearly of opinion that where an issue of this sort, which in the North is called a General Issue, is granted, the learned Judge at the trial is fully justified in looking, and ought to look at the record, and to confine both parties to the facts and circumstances which are therein alleged. Looking at the record in this case, it seems to me that it excludes evidence of the trial which is supposed to have taken place at *Irvine*, and that the defenders were not justified in entering into evidence of such trials at any of the places which are not specified in the record.

I should have been most sorry indeed to have at all prejudiced the salutary practice which prevails in *Scotland* upon this subject, and I wish that in *England* similar rules prevailed. According to the ancient practice of pleading in *England* there was notice given, because in a writ of right the demandant stated specifically the title that he made; but in an ejectment nobody can tell what case is to be made on the part of the lessor of the plaintiff; and I can say, from my own experience, that I have repeatedly gone into Court, being counsel for the defendant, where an action was brought to recover a large estate, not only ignorant of the particular facts that were to be given in evidence, but not knowing what title was to

be made; whether the lessor of the plaintiff claimed as heir at law or under a deed; whether he impeached the title of the purchaser in himself, or whether it was a question of parcel or no parcel. That certainly leads frequently to surprise in *England*, and renders it necessary, on the ground of surprise, that a new trial should be granted. A much more salutary system prevails in *Scotland*, which I know this House most highly approves of, and will most carefully guard.

The other exceptions, till we come to the eleventh, turn upon the construction of the letters-patent. Now in one stage of these proceedings, I certainly did entertain some doubt on that subject; but after the construction put upon them by the learned Judges of the Court of Exchequer, sanctioned by the high authority of my noble and learned friend now upon the woolsack, when presiding in that Court, I think the patent must be taken to extend to all machines of whatever construction, whereby the air is heated intermediately between the blowing apparatus and the blast-furnace. That being so, the learned Judge was perfectly justified in telling the jury that it was unnecessary for them to compare onp apparatus with another, because confessedly that system of conduit-pipes was a mode of heating air by an intermediate vessel between the blowing apparatus and the blast-furnace; and therefore it was an infraction of the patent.

But, my Lords, when we come to the eleventh exception, I most sincerely and deeply regret, after all this litigation, and when very probably the verdict would have been the same if the direction had been unexceptionable, I most sincerely regret that we are bound to allow it. I have struggled as much as

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I could against this exception. I was very anxious if possible to consider either that the learned Judge was talking merely of experiments, or, if he was wrong in point of law, that the direction was immaterial. But, my Lords, after very anxious consideration of the record and the proceedings, it is impossible for me to get rid of the exception, either upon the one ground or the other. For the reasons stated by my noble and learned friends who have preceded me, it seems to me now quite clear that the learned Judge was not speaking of experiments, but that he was speaking of prior use of the invention. That appears from the language of the learned Judge himself. It appears still more clearly from the exception, to which he did not object. It appears still more clearly from the language of the learned Judges of the Second Division, when the case came to be discussed before them. They did not at all consider that the observations of the learned Lord *Justice-Clerk* referred to experiments; they all seem to have considered that it applied to the prior use of a perfect machine.

Then if that be so, there can be no doubt whatever that the law which he laid down upon the subject was mistaken; because to suppose that there may have been a prior use of the invention, of the perfected invention, for which the letters-patent are granted, and that that prior use publicly known will not vitiate the patent, if it has been abandoned but a few weeks before the date of the patent, strikes us in this part of the country with astonishment. That certainly is not the law as we have ever understood it; and I think, after the opinions of my noble and learned friends who have preceded me, I can have no hesitation in saying that that cannot be considered as the law of this country.

The learned Judges in *Scotland* seem to me, with great deference, to have been misled by the expressions that are ascribed to Mr. Justice *Patteson* and to Lord Chief Justice *Tindal*. Now I was counsel in the case of *Jones v. Pearce*, and I believe that the account of it in Mr. *Godson's* book is substantially correct. But what Mr. Justice *Patteson* may have said in that case, and what Lord Chief Justice *Tindal* may have said in the other case, taken in conjunction with the whole of their direction, amounts to this, that the abandonment may be material for the assistance of the jury to consider whether it be a perfect invention or not, but assuming it to be a perfect invention, the abandonment becomes wholly immaterial.

The learned Judge, therefore, in *Scotland*, in assuming that the direction of the learned Judges in *England* to the jury upon a point of fact to assist the jury upon the point of fact, was laid down by the learned Judges in *England* as a point of law, was certainly mistaken.

That being so, the only question that remains is this, whether this misdirection shall be considered as immaterial. But when I look at the form of the issue, I cannot say that it was immaterial, because the issue is whether the invention, as described in the said letters-patent and specification, is the original invention of the pursuer. Now you cannot say that it was the original invention of the pursuer within the meaning of the issue, if it had been publicly known and practised by others before the patent was granted. It has been said that there was no evidence: but I think that is a mistake. What conclusion the jury would have come to, I know not; but at the *Bradley* iron-works there was such a machine, as Mr. *Rutherford* acknowledged at the bar, as would have amounted

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to an infraction of the patent, if the use of it been subsequent to the patent. Then that being I know not what conclusion the jury might have arrived at. They might have thought that this was a perfect machine, that it was the same machine, that it had been publicly used. If they had been of that opinion, although it had been abandoned, they ought to have found a verdict for the defenders.

Under these circumstances, I regret exceedingly that I am obliged to concur in the opinion that has been expressed by my noble and learned friends, that this eleventh exception must be allowed; and the consequences of that will be, that there must be a *res facias de novo*, and that the cause must be tried another jury.

The *Lord Chancellor* :—If there had been a doubt whatever with respect to the meaning of the words used by the learned Judge in summing up, those doubts would be removed by the concluding words, “that it must have been known and used as a useful thing at the time.” What? The invention must have been known and used as a useful thing at the time of the granting of the letters-patent. That shows demonstrably what was intended.

It must not be understood that your Lordships, in giving the judgment which you are about to pronounce, have given any decision upon this state of facts, namely, that an invention had been formerly used and abandoned many years ago, and the whole thing had been forgotten. That is a state of facts not now before you; it is not raised upon this record; therefore it must not be understood that we have pronounced an opinion whatever upon that state of things. It is possible that an invention may have existed 50 years

ago, and may have been entirely lost sight of, and not known to the public. What the effect of that state of things might be, it is not necessary for us to pronounce upon.

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Lord *Brougham*:—The interlocutor is to be reversed on the eleventh exception; affirmed *quoad ultra*.

Mr. *Rutherford* suggested that the remitting the cause to the Court below, to proceed accordingly, would be sufficient to enable the Court to give directions for a new trial. And the Court might then deal with the costs, including those of this appeal, according to the ultimate result.

Lord *Brougham*:—You cannot have the costs of appeal, when on the main point there is a reversal.

The *Lord Chancellor*:—It is not a case in which we ought to give costs on either side.

It was ordered, that the interlocutor of the 27th of *January* 1842, complained of in the appeal, be affirmed with costs: That the interlocutor of the 20th of *July*, also complained of, be reversed, in so far as it disallowed the 11th exception stated in the bill of exceptions, and found the pursuers in the action in the Court below entitled to the expenses incurred by them in the discussion on the bill of exceptions; but that in all other respects the last-mentioned interlocutor be affirmed: And it was declared, that the said 11th exception ought to be allowed, and that neither party is entitled to the expenses incurred by them respectively in the discussion on the bill of exceptions in the Court below: And it was further ordered, that with these declarations the cause be remitted to the Court of Session, to proceed further therein as shall be just and consistent with these declarations and judgment.

1843:
March 2. 9.

WILLIAM MACKERSY - - - *Appellant.*

RAMSAYS, BONARS, AND Co. - - *Respondents.*

*Principal
and Agent.
Bankers.
Costs.*

M. employed *R.* and Co., bankers in *Edinburgh*, to obtain for him payment of a bill drawn on a person resident at *Calcutta*. *R.* and Co. accepted the employment, and wrote promising to credit him with the money when received. *R.* and Co. transmitted the bill in the usual course of business to *C.* and Co. of *London*, and by them it was forwarded to *India*, where it was duly paid. *R.* and Co. wrote to *M.* announcing the fact of its payment, but never actually credited him in their books with the amount. The house in *India* failed.—

HELD, that *R.* and Co. were the agents of *M.* to obtain payment of the bill; that payment having been actually made, they became *ipso facto* liable to him for the amount received; and that he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed.

Where the judgment of the Court below is reversed in this House, and the House pronounces the judgment which ought to have been pronounced in the Court below, the effect of such judgment is to give to the Appellant the costs of the suit in the Court below, which he would have had there, had the proper judgment been pronounced in the first instance in that Court.

This House never gives costs against a party coming to sustain a decree in his favour.

THE Respondents were bankers in *Edinburgh*. In *December* 1826, the Appellant's brother, *Lindsay Mackersy*, opened an account with them, and a cash credit, formerly belonging to his father, was transferred to him. He continued to operate upon this cash credit from *December* 1826, until the period of his own death in *December* 1834.

The account between Mr. *L. Mackersy* and the Respondents was kept in the usual manner; that is to say, by means of a pass-book in which all the

operations in the account were entered, and which was examined, and the balance ascertained and settled periodically.

During this period Mr. *L. Mackersy* had occasion to draw bills upon Mr. *W. Clelland*, of *Calcutta*, and having no agent at *Calcutta*, he applied to the Respondents to negotiate these bills for him. The Respondents undertook the negotiation of these bills, and passed them, through their own *London* agents, to *Calcutta*, for acceptance and payment. The letter of *L. Mackersy*, containing the first of these bills, was dated 10th *August* 1829, and was in the following terms:—"I beg leave to enclose my draft on *William Lennox Clelland*, Esq., barrister, *Calcutta*, for 100*l.*, of this date, payable at 30 days' sight; which be so good as forward for payment, placing the proceeds, when paid, to my credit.—To Messrs. *Bonars & Co.*"

The Respondents, on the 12th of *August*, transmitted this bill to Messrs. *Coutts* and Co., in a letter in these words:—

"We enclose *L. Mackersy's* draft on *W. L. Clelland*, *Calcutta*, *pro* 100 *l.*; which we will thank you to forward for payment, and advise us when you hear it is paid."

And on the 24th of *August* 1829, Messrs. *Coutts* forwarded the bill to Messrs. *Palmer* and Co., their then correspondents at *Calcutta*, in a letter, in which they said:—

"Enclosed we trouble you with two bills for collection, the proceeds of which you will please remit us, after making the usual deduction. 100 *l.* *Lindsay Mackersy*, at 30 days, on *W. L. Clelland*, Esq."

The bill, according to its own tenor and course of remittance, might be expected to be paid about the

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month of *January* 1830. No intelligence of its payment having been received, the Respondents, on the 18th of *August* 1830, wrote to Messrs. *Coutts* asking for advice of its payment. This letter was answered by one dated 21st of that month, in these terms:—

“In a letter from Messrs. *Palmer* and Company, dated 21st *December* last, they inform us of the acceptance of your remittance, 100 *l.*, *L. Mackersy*, at 30 days, on *W. L. Clelland*; and that, when paid, they would make us a remittance. Since then we have not heard from them on the subject.”

The following letters afterwards passed between the parties. The Respondents wrote to Messrs. *Coutts* and Co., on the 20th *November* 1830, a letter to this effect:—

“By your letter of 21st *August*, you informed us that you had been advised of the acceptance of the bill on Mr. *Clelland*, *Calcutta*, *p.* 100 *l.*, but had not received a remittance for the amount. The owner of the bill called on us a few days ago to inquire if any remittance has since been made.”

On the 30th of *November* 1830, the Respondents wrote to Mr. *Mackersy*:—

“Messrs. *Ramsays*, *Bonars*, and Co., with compliments to Mr. *Mackersy*, in reply to their inquiry, Messrs. *Coutts* and Co. write: ‘We have not received any farther advice from *Calcutta* regarding the bill on *W. L. Clelland* for 100 *l.*’”

Here the matter rested for some months, at the end of which time the Respondents wrote to Messrs. *Coutts* and Co. a letter, dated 15th *July* 1831, in which they said:—

“Mr. *L. Mackersy* has again been inquiring of us, whether you have yet received payment of his draft

on Mr. *Clelland*, *pro* 100 *l.*, remitted you on 12th *August* 1829. Be so good as to inform us if you have had any information from *India* on the subject."

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The Respondents, on the 21st *July* 1831, sent to Mr. *Mackersy* the result of this second inquiry:—"We have received no communication from *Calcutta*, *pro* 100 *l.* on *W. L. Clelland*, which was forwarded for collection to *Palmer* and Co.. If we should not soon hear from their assignees, we will take an opportunity of writing them on this subject."

"Messrs. *Ramsay*, *Bonars*, and Co.'s compliments to Mr. *Mackersy*, and send above an extract from Messrs. *Coutts* and Co.'s letter by last post, in reply to their inquiry about the bill on Mr. *Clelland*, *Calcutta*."

Mr. *Mackersy*, on 10th *February* 1832, sent to the Respondents the second bill, which forms the subject of the present case. It was accompanied with a note to the following effect:—

"I beg leave to enclose draft (first and second of exchange) on *W. L. Clelland*, of *Calcutta*, dated 9th current, at 30 days' sight, *pro* 100 *l.*; which be so good as forward for payment.—10th *February* 1832." The Respondents acknowledged the sending of this second bill in the following terms:—"We have your letter of yesterday, covering your draft at 30 days on *W. Clelland*, of *Calcutta*, *pro* 100 *l.*; which we will forward for payment, and at maturity place to your credit."

The Respondents transmitted this second bill to Messrs. *Coutts* and Co., enclosed in the following note:—"Enclosed is Mr. *Lindsay Mackersy*'s bill on *William L. Clelland*, *Calcutta*, at 30 days, for 100 *l.*; which we will thank you to get forwarded for payment, advising us when the amount is received.

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Please inform us if you have yet had any communication from the assignees of Messrs. *Palmer* and Co. relative to the similar bill on Mr. *Clelland*, *pro* 100*l.*, forwarded for payment in *August* 1829."

Messrs. *Coutts* and Co. sent this second bill to Messrs. *Alexander* and Co., their new agents at *Calcutta*, whom they likewise requested to make inquiry as to the fate of the former bill, 29th *February* 1832.

On 4th *December* 1832, Messrs. *Coutts* and Co. received a letter from *Alexander* and Co., dated 10th *July* 1832, acknowledging the receipt of the second bill, and communicating information from the assignees of *Palmer* and Co., to the effect that the first bill had been paid to *Palmer* and Co. on 22d *January* 1830, and that the amount was held by the assignees for Messrs. *Coutts* and Co.

Messrs. *Coutts* and Co. immediately transmitted this intelligence to the Respondents, who again communicated it to Mr. *Mackersy*, by the following letter:—

"We have the pleasure of sending you the above extract of a letter from Messrs. *Coutts* and Co., received last post, giving an account of the bill on Mr. *Lennox Clelland*, *Calcutta*, given to us for negotiation by you in *August* 1829. When the amount is received, we will advise you."

"We have received this day (4th *December* 1832), from *Calcutta*, a reply to our inquiry regarding the bill drawn 10th *August* 1829, by *Lindsay Mackersy* on *W. L. Clelland*, *pro* 100*l.*; by which it appears that the amount, s. rupees 1,089. 12. 6., will be paid on our order. We shall send out immediately the required instructions for remittance to us."

Mr. *Mackersy* wrote, in answer, to the Respondents as follows:—"I feel obliged for the information con-

tained in your letter of yesterday. You will of course take care that interest from the time at which bills on *India* are usually paid here, be also recovered, as my correspondent cannot be made to suffer on account of the failure of Messrs. *Coutts* and Co.'s correspondents. The bill was, I take for granted, paid when due by Mr. *Clelland*. I have an impression indeed that he advised me of the circumstance, and shall, if necessary, look through my letters to ascertain the fact, or write to him on the subject. I shall be glad to hear from you when you have advices of the payment of my other bill. With your permission I shall leave the balance of my cash account unsettled till then, but should you have any objections, it can be paid up whenever you wish it."

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The Respondents having received no tidings of the actual recovery by Messrs. *Coutts* and Co., during the year 1833, of the proceeds of either of the bills, they wrote to Messrs. *Coutts* and Co., on 11th *February* 1834, as follows:—

"By your letter of 4th *December* 1832, you informed us that the amount of *L. Mackersy's* bill on *W. L. Clelland*, of 10th *August* 1829, 100*l.*, being s. rupees 1089. 12. 6., was to be paid in *Calcutta* to your order, and that you would immediately forward the necessary instructions for the remittance of this sum. Be so good as inform us if you have had advice of this remittance; also if you have been advised of the payment of a similar bill *pro* 100*l.*, sent you for negotiation by our letter of 11th *February* 1832."

Messrs. *Coutts* and Co. answered, "We have heard nothing from *Calcutta* regarding the bill on Mr. *W. L. Clelland*.—14th *February* 1834."

The account current kept by Mr. *Mackersy* with the Respondents was in the meantime open, and

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transactions taking place upon the account, and which transactions were entered in the pass-book in the ordinary form.

Upon 14th *March* 1834, the Respondents wrote Mr. *Mackersy*, in regard to the account current and the *India* bills, as follows:—

“We were favoured with your letter of the 11th instant, and agreeably to your request send herewith your pass-book, which has been lying with us. The interest, you will observe, was added to the amount on 31st *January* last, when the sum due by you was 187*l.* 4*s.* 11*d.*, and was carried to your debit in a new account. If correct, be so good as sign and return to us the enclosed order for the amount. Having cancelled our receipts, we herewith return your vouchers. In reply to your inquiry as to the bills on the late Mr. *Clelland*, of *Calcutta*, we are sorry to have to say that no remittance on account of them has been received by Messrs. *Coutts* and Co. We wrote them, we may observe, on this subject, on the 11th *February* last, and their reply was, ‘We have heard nothing from *Calcutta* regarding the bills on Mr. *W. L. Clelland*.’”

Mr. *Mackersy* retained the pass-book, but delayed sending the order for the balance until the 7th *April* 1834, when he transmitted the order to the Respondents, accompanied with the following note:—

“I have to apologise for not sooner returning the enclosed order for 187*l.* 4*s.* 11*d.*, being the balance due on my account with you, without reference to my two bills on late Mr. *Clelland* for 100*l.* each, and interest thereon.

“I am surprised to learn that no remittance in payment of either of these bills has yet reached Messrs. *Coutts* and Co., as by your letter of 17th *December*

1832, you sent me an extract from a letter of theirs, mentioning that, by advices from *Calcutta*, the amount was ready to be paid to their order. You will, of course, take care that interest is duly accounted for on those bills, which were paid by my correspondent at the time, and the non-remittance of which for so long a period has arisen, I presume, solely from the failure of Messrs. *Coutts*' agent in *Calcutta*. This is the more necessary as I have to account with minors, who are but slenderly provided for."

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Alexander and Co. failed before they received Messrs. *Coutts* and Co.'s authority to obtain the proceeds of the first bill from the assignees of *Palmer* and Co. *Alexander* and Co. had, however, got payment of the second bill from Mr. *Clelland* before the bankruptcy.

This state of matters was communicated to the Respondents by Messrs. *Coutts* and Co. in *June* 1834; and the Respondents immediately put Mr. *Mackersy* in possession of the information received from *Coutts* and Co.

Mr. *Mackersy* wrote to the Respondents on 30th *June* 1834, and intimated his intention to claim the contents of the bills from the Respondents; but he died in the month of *December* 1834, without actually taking any proceedings.

Mr. *Mackersy* was succeeded in his property by his brother, the present Appellant, Mr *William Mackersy*.

The Respondents continued their correspondence with Messrs. *Coutts* and Co. regarding the bills, and in the beginning of *November* 1835 received a letter from Messrs. *Coutts* and Co. intimating that the proceeds of the first bill had been actually realized by them through their new agents in *Calcutta*, Messrs.

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Gillanders and Co. In the accounts furnished the *Indian* houses, or by the accountants on the bankruptcy, interest appeared to have been regularly calculated and allowed on the bills.

This information was forthwith communicated the Appellant, by the following letter from the Respondents:—"We have to inform you that Mess *Coutts and Company* now advise us that they have received the proceeds of the bill *pro 100l.* on *M. W. L. Clelland*, of *Calcutta*, handed to us by your late brother, *Mr. Lindsay Mackersy*, for negotiation, and forwarded to *India* in 1829; amount - £.106 16

This sum accordingly, less commission

in <i>London</i>	-	-	£.	1	-	-
And postages	-	-		1	4	6
						2 4

Being - - - - £.104 11

we have placed, of this date, to the credit of your late brother's account."

In *June* 1836, the Respondents claimed a cash balance from the Appellant upon his late brother's account. This balance he insisted ought to be reduced by the amount of the second bill and interest, but they refused to make the deduction.

On the 13th *October* 1836, the Respondents instituted proceedings against the Appellant for payment of the balance due upon the cash account, amounting as at 11th *May* 1836, to 97*l.* 19*s.* 11*d.*

The Appellant put in pleas to the following effect: 1st. That the pursuers were, in the circumstances contended on, liable to the defender's brother for the interest on the first-mentioned *India* bill as claimed, as also for the principal sum contained in the second bill and interest; and the balance sued for is thereby extinguished.—2d. That at least the pursuers were

and are bound to show that said sums of interest and principal have not been recovered by their correspondents and themselves, and that due diligence was used in these transactions by them and their correspondents, and to furnish the defender with documents and information sufficient to enable him to recover what was due on the said bills; and the defender is in the meantime entitled to retention of the sum sued for.

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To these two pleas the Respondents replied,—“The pursuers are not, under the circumstances condescended on, responsible for any part of the loss which has arisen, or yet may arise, upon the *India* bills referred to by the defender.”

The Appellant afterwards added to the record the following plea :—“Under the circumstances now discovered, it is sufficiently established that the pursuers, and those for whom they are answerable, did not employ due diligence in recovering the sums of money in question, and they are thus liable to make good the deficiency thence arising.”

The Respondents replied that,—“The pursuers are not liable for any alleged negligence or irregularity on the part either of *Coutts* and Co., or of the *Indian* agents, in respect the pursuers fully discharged their duty by timeously transmitting the bills to *Coutts* and Co., with proper directions as to the purpose of their transmission, and have given the defender credit for all the sums actually received by them on account of the bills.”

The defence, however, principally relied upon by the Appellant on the argument, was that involved in his original pleas, viz.—That the Respondents became responsible for the contents of both bills from the time at which they were respectively paid by the acceptor in *India*, and that consequently the Respondents were

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now bound to give credit for the whole amount of the second bill, together with interest upon the first bill.

The Respondents maintained that this plea was inconsistent with the true nature of the arrangement under which they received the bills from Mr. *Mackersy*, it being clear from the correspondence that they merely took the bills for the purpose of negotiation, and upon the understanding that they were to be chargeable only for the proceeds of the bills when actually paid to them or to their immediate agents Messrs. *Coutts* and Co.; and they likewise founded upon a prior judgment in a similar case between Miss *Campbell* and the Royal Bank of *Scotland* (a).

The Lord Ordinary (Lord *Cockburn*), on the 21st December 1839, pronounced an interlocutor sustaining the Appellant's defence. He appended the following note:—

“*Note.*—The pursuers found on the case *Campbell* against *The Royal Bank*, as lately decided by Lord *Moncrieff*. The Lord Ordinary could not venture to differ from a deliberate judgment pronounced by that Judge on such a matter, without the greatest diffidence and reluctance. But in one vital fact the two questions are essentially different. It appears from Lord *Moncrieff*'s interlocutor and note (which are all that the Lord Ordinary has seen of that case), that the bill there was given to the bank simply and exclusively for the gratuitous purpose of being negotiated. It was more an office of friendship than anything else that the bank undertook. Lord *Moncrieff* was of opinion, that in these circumstances, there being no blame attached to the negotiators, the money which was lost in the hands of the person whom they reasonably and prudently employed in *Calcutta*, perished to the owner.

(a) 2 Durl. & Bell, 1010.

“But here the defender (or his author) was the debtor of the pursuers, and they took from him two bills on *Calcutta*, on account of his debt, stating, ‘We shall forward them for payment, and, at maturity, place to your credit.’ They sent the bills to *India* through the house of *Coutts* and Co. of *London*; the intervention of which house, however, makes no difference in the case, because *Coutts* and Co. were employed solely by the pursuers, and were the agents as much as the persons in *Calcutta* to whom *Coutts* and Co. sent the bills. These were matters with which the defender had no right to interfere. He had given two bills on account of his debt; the creditors took these bills and engaged to negotiate them, for which negotiation both they and their foreign agent charge commission: now both bills were paid to persons empowered by the pursuers through *Coutts* and Co. to receive payment; at that moment the law placed them to the credit of the defender. But the interest of the first bill, and both principal and interest of the second, were lost in the hands of the *Indian* agents, who failed after receiving payment, but one of them not till about five months thereafter.

“The Lord Ordinary thinks that, whatever the pursuers may make of *Coutts* and Co., the loss in settling between them and the defender must fall upon them. The substance of the opposite plea is, that he had no right to be credited with the contents of the bill till they reached maturity, and that they could only do so by the money reaching the pursuers. In one view this is not sound, but in another it is, for the money did reach the pursuers when it was paid to their agents.—(Initialed) *H. C.*”

The Respondent carried this interlocutor before the Inner House, where it was reversed, and the Court

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by two interlocutors gave judgment for the Respondents. The present appeal was then brought.

Mr. *Kelly*, for the Appellant:—The Respondent here received the bill according to the contract contained in the letter in which it was transmitted to them. The Respondents transmitted it to *Coutts and Co.*, who thus became their agents for the purpose of forwarding the bill to *India* to get it paid. *Coutts and Co.* transmitted the bill to *Alexander and Co.*, who did actually receive the money in *August* 1832, and placed it to the credit of *Coutts's* house. This was a payment of the bill to *Coutts and Co.* The subsequent failure of *Alexander and Co.* could make no difference in this state of circumstance. *Mackersy* is not the person on whom the loss must fall. There was no privity whatever between him and any subordinate agent whom his bankers might employ. When *Ramsay and Co.* received this bill in the course of their business, they were bound to present it for payment, and when so presented by the person they employed, he became their agent; and there being a privity between them and *Coutts and Co.*, the receipt by the latter was a receipt by the former to *Mackersy's* use. The first question here is, whether *Alexander and Co.* were the agents of *Mackersy*. They were not. The law is clearly settled, that where authority is given to an agent to conduct a particular business, if he employs sub-agents they become his agents, and not the agents of the principal. *Palmer on Principal and Agent* (b). The doctrine there is supported by several cases. He says, "an inferior agent is only accountable to his immediate employer and not to the principal;" *Cartwright v. Hately* (c).

(b) P. 49.

(c) 1 Ves. jun. 292.

The case of *Pinto v. Santos* (d) is to the same effect. There is another case, *Schmaling v. Thomlinson* (e), where A., employed by the defendants to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it without the privity of the defendants; it was held, that as there was no privity between the parties, the action for services rendered as between those parties could not be maintained. *Macdonald v. Macdonald* (f) proceeded on a similar principle. In that case Dr. *Macdonald* died in *India*. The defendant interested himself, so far as appeared, gratuitously, to recover his assets for the sister of the Doctor. The funds were remitted from *India* to *Hannay and Co.*, who failed. The defendant employed his agent to recover the money. The agent did recover it, but instead of transmitting it, gave promissory notes to the defendant, as if he had received value from the defendant. The agent became bankrupt, and the notes were dishonoured. The Court held that the money ought, as soon as recovered, to have been remitted to the sister, and that the defendant made himself liable as mandatory or *negotiorum gestor*, by letting it go into the hands of his own agent, and taking notes for the amount payable to himself. It is clear on these authorities that, in order to create liability, there must be a direct privity existing between the parties; and where such privity does not exist, neither agency nor liability can be created. It is true that he had there taken bills, and at long dates; that circumstance does not exist here. But here *Alexander and Co.* passed the amount of the bill in account with *Coutts and Co.* to their credit, and under circumstances that gave *Mackersy* no con-

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(d) 5 Taunt. 447.

(e) 6 Taunt. 147.

(f) Hume's Collection, 344.

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trol over it. The rule, therefore, to be deduced from these authorities applies here; namely, that as soon as received, the money ought to have been immediately remitted; and as it was not so remitted, the loss could not fall on the principal in the transaction; *Thomson v. Logan (g)*. There the employment was that of a wine-cooper, who employed a sub-agent, who mismanaged the wine placed under his care, and the agent was there held liable for the mismanagement by the sub-agent. So that in all these cases this principle has been observed, that where one employs another to transact a particular business, and he employs others, they are his agents, and not the agents of the principal. There is no privity between them, the sub-agents and the original employer. Applying that principle to the present case, it is clear that when this bill was placed in the hands of *Ramsays*, they became the parties liable, and on their employing sub-agents, they became liable for the failure of the sub-agents, and that the Appellant is not liable to bear the loss. If that was not so, this inconsistency would follow, that he would be bound to take the consequences of the acts of the sub-agents, though if he had been personally present in *India* he would not have been entitled to take the money out of their hands. Suppose the case of a sum of money drawn for by a gentleman at *York* on his debtor in *London*. Suppose the gentleman draws in favour of his banker in *York*, and the banker acknowledges the receipt of the bill, and says he will place it to the credit of the gentleman. Suppose that banker remits it to *London* bankers, to present. Suppose the bank in *London* failed six months after the payment of the bill, the *York* banker would be liable to the customer; for if

(g) July 16, 1754; 5 Brown's Sup. 254.

the gentleman had come to *London* and asked the *London* bankers for the money, the *London* bankers would say that they knew him not, and had nothing to do with any one but the *York* bankers.—[Lord *Campbell* : More will depend on the correspondence and the mode of dealing, than on any general principle.]—Then refer to the correspondence. Look at the letter 11 *Feb.* 1832. That shows that the bill was to be placed to *Mackersy*'s credit only when the bill had arrived at maturity. This is confirmed by the letters to *Coutts*, requesting advice when the amount is received. *Mackersy* has nothing to do with the course of business between *Ramsay* and *Coutts*, or their agents; he could only look to *Ramsay* and Co. All that he has to do is to see what is the contract between him and them. Now they undertake to place the bill to his credit on the day when they receive advice that the money has been received. The contract therefore was, that this bill being delivered by *Mackersy* to *Ramsay* and Co., *Mackersy* was entitled to credit from them the moment when the money was known by *Ramsay* to have been received by any of their agents or sub-agents. The first letter shows the nature of the transaction in its origin.—[Lord *Campbell* : When the bill is received, and *Ramsay* and Co. inform *Mackersy* of it, is he entitled to be credited for it from the day of actual payment.]—He is.—[Lord *Campbell* : Then are *Ramsay* and Co. to be liable for the intermediate interest ?]—They are. The agents here were paid agents, and that distinguishes this case from that of *Campbell v. The Bank of Scotland*, relied on by the Respondents in the Court below. In *Paley* on Principal and Agent (*h*), it is said, “agents are not only responsible for the per-

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formance of these duties in their own persons, but are sureties for those whom they themselves employ in the execution of the service they undertake ;” and Lord *North’s* case (*i*) is cited. That case is to this effect: The Chancellor of the Augmentations delivered a bond, which he had taken for the Queen by virtue of his office, to his servant, to hand it over to the clerk of the Court who had the charge of the bonds and specialties of the Crown ; the servant conspired with the obligors, and cancelled the bond ; his master was held chargeable to the Queen for it, and upon this ground, that he was answerable to the Queen for the act of his servant, who was his agent and not the Queen’s. The authority of that case has never been doubted, and it is decisive of the present.

Mr. *G. Willmore*, on the same side :—There was no privity here between the Appellant and Messrs. *Alexander*. The Appellant, therefore, had no rights capable of being enforced as against them, and consequently could not be affected by their failure. The rule that a sub-agent is accountable to the agent only and not to the principal, because there is no privity between them, is distinctly stated in *Story* on Principal and Agent (*k*), where it is said that, “on a principle connected with the want of privity, a sub-agent is accountable to the superior agent who has employed him, and not generally to the principal.” In *Stephens v. Badcock* (*l*) an attorney had been employed to collect certain sums of money. The attorney went from home, and in his absence the debtor paid the money to a clerk of the attorney; the attorney himself absconded; the client brought an action against the clerk; but the Court held that the action would not lie, for that

(i) *Dyer*, 161.

(k) *C.* 7, s. 217.

(l) 3 *Barn. & Ad.* 354.

there was no privity between the client and the clerk. *Cull v. Backhouse* (m) is a case to the same effect. The Court there held that, as there was no privity between the principal and sub-agent, the latter could not maintain an action against the former for the work performed and money expended. There is no such distinction as the Court below supposed between the cases where a party is compelled to employ an agent, and where he need not have done so. That was the very case of *Schmaling v. Thomlinson*. A country attorney, it is known, will not come up to *London* to perform the business in which he is employed; it is known that he will employ an agent, although there is no absolute necessity for such employment. That agent is not liable to the client, though the injury from which the client may suffer may be the act of the *London* agent, and not of the country attorney. There can be no distinction in the liability of the banker, as to bills which he collects in town by his ordinary clerks, and those which he collects in distant towns by the means of persons residing there. In *Matthews v. Haydon* (n) a client desired his attorney to get the amount of a bill; that attorney employed another; the clerk of the second attorney received the money and handed it to his master. The client brought an action against the first attorney. It was attempted there to be maintained that the act of the sub-agent did not operate to fix the liability on the superior; but Lord *Kenyon* said, "Where a person authorizes another to receive money for him, payment to the party so authorized is payment to the principal. In this case the defendant empowered *Dale* to receive the money for him, by delivering to him the bill of exchange; and it being proved to have come to *Dale's*

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(m) 6 Taunt. 148, n.

(n) 2 Esp. Rep. 509.

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hand, it shall not be allowed to the defendant to dispute the receipt of it." That authority is distinct. The case of *M'Vicar v. M'Gregor (o)* is also in point against the Respondents. The defendant there was a merchant in *Edinburgh*, who advertised for employment as a navy agent. In that character he obtained and transmitted to *Keith*, in *London*, a power of attorney from the plaintiff to receive money from the Navy Pay Office. *Keith* received the money, kept it two years, and became bankrupt. The argument there raised was, that there was no fault in *M'Gregor*, as it was necessary to employ some one else to collect the money in *London*. But the Court held that such an argument afforded no defence; for that if a person resident in *Edinburgh* advertised himself as a navy agent, and undertook, though it might perhaps be imprudently, to receive money in *London*, he must be answerable for the conduct of all who were employed by him to perform the business he had undertaken. If the *Ramsays* had failed, they would have claimed this money as part of the assets of their estate; their assignees would have held it. How then can it be said that they would have had this right, and yet that, on the failure of their own selected correspondents, they are not subject to responsibility to their customer?

Then as to the contract. They accepted the employment, and by their letter bound themselves to credit the Appellant with the money the moment the bill was paid. But if the contract is not clear from the terms of their own letter, the construction must be given against them, for they are not to take advantage of a doubtful expression which they themselves have used. But the language is not doubtful:

(o) Hume's Collection, 347.

it does not mean when the money is paid into their own hands in *Edinburgh*, but when the bill was paid in *India*.

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The words of the second letter show what was the contract which the parties entered into. It was a contract in which the Respondents became liable to the principal as his agents, and in that character took on themselves the management of the business entrusted to them. His dealing was with them alone, and from them he is entitled to look for payment of that money which they must be taken to have received.

The *Lord Advocate*, for the Respondents:—The contract between the parties, and not any general rule of law, must decide this case. The expression “when paid” is ambiguous. The letters show that the payment spoken of is the payment made to *Coutts* and Co. in *England*. In all of them the expression “remittance” is used. And in the very last letter asking for information, the information required is what had been done with *Coutts*, not what had been done in *India*; and the answer to this letter was forwarded by *Ramsay* and Co. to the Appellant.—[*Lord Campbell*: What is the meaning of the expression used by *Ramsay* and Co., “When the amount is received, we will advise you?”]—When it is received in this country, and *Coutts* and Co. have given credit to us, *Ramsay* and Co.—[*Lord Campbell*: Were not *Coutts* and Co., the moment they received credit in account from their correspondent in *India*, bound to give credit to *Ramsay* and Co. ?]—It does not appear that *Coutts* and Co. ever got credit for the second bill; and there is no averment that they did so get credit. On a consideration of all the letters which show the nature of the dealings between the

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parties, it is clear that they were only liable to hand over the money to the Appellant when they received it. They themselves had no correspondents in India and their employment of other persons was a matter of necessity. That circumstance much affects the question of their liability. *Coutts and Co.* were not to account to *Ramsay and Co.* till *Coutts and Co.* had received the money, and *Ramsay and Co.* were therefore not liable to account to *Mackersy* till they had received the money from *Coutts and Co.* Several cases have been cited to show that when an agent employs a sub-agent, the principal has nothing to do with the latter. The general principle there laid down is not applicable to this case. The contract here must decide the liability in this instance. The cases of attorneys collecting money are not in point. In them the attorney employs a person to do something which he was employed to do, and which he might have done in his own person; but the circumstance here rendered it impossible for *Ramsay and Co.* to perform in person the employment. The case from Baron *Hume's Reports* is not in point. There the party had been, through his own negligence or wilfulness, in fault, and was consequently held personally liable. He had allowed his own agent to retain the money, and had made the debt his own by giving the agent credit for it, receiving from him bills for the amount, and those bills too drawn at distant dates so that the principle applicable in that case was that of liability wilfully incurred, and operating wrongfully on the interests of the party whose affairs the defendant had taken in hand. The case of *Campbell v. The Bank of Scotland* is in point.—[Lord *Campbell*: Was that case brought before the Inner House?—It was not; it appears to have been acqui

esced in. Lord *Cockburn* thinks he had discovered a distinction. What is that distinction? He says, "In one vital fact, the two questions are essentially different. The bill there was given to the bank simply and gratuitously for the purpose of being negotiated. It was more an office of friendship than anything else that the bank undertook. Lord *Moncrieff* was of opinion that in these circumstances, there being no blame attached to the negotiators, the money which was lost in the hands of the person whom they reasonably and prudently employed in *Calcutta*, perished to the owner; but here the defender was the debtor, and they took from him two bills on *Calcutta* on account of his debt." Where did he find that? No such fact is stated in the evidence, and the whole ground of the supposed distinction, therefore, fails: *Campbell's* case is consequently decisive of this.

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[Lord *Cottenham*:—If *Ramsays* had received this bill in money, *Mackersy* could not have demanded it. By contract he was to have credit for it in account.]

And accordingly the account was settled in 1834, and these bills were not placed in it; a balance was found against him, and he gives a note for it: so that even then, by his own admission, the *Ramsays* were not liable on these bills; he cannot afterwards undo the effect of this settlement. The loss was one which did not happen from the negligence or misconduct of the *Ramsays*, and they are not liable to make it good. The interlocutors of the Court of Session are correct, and ought to be affirmed.

Mr. *Pemberton*, on the same side:—This case is not now put on the ground of negligence in omitting to receive the money, though such ground is put in the papers. And it is important to remember this,

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for it has been argued in this House that the *Ramsays* are to be charged on the ground that *Coutts* and *Co.* had received it. The record raises no question of that kind. The question is not, whether *Ramsay* and *Co.* would have been liable on account of the money having been actually received by *Coutts* and *Co.*; but, whether the money, when received in *India*, was to be considered so completely received by *Ramsay* and *Co.* as to make them at once liable to pay it over to the Appellant? The letters which constitute the contract show that such a liability was never imagined. It appears there that it never was the intention of *Ramsays*, who received the bill, or of *Mackersy*, who deposited the bill, to treat the receipt by a house in *India* as the receipt by *Ramsays*. One test of that is the time to interest. If they were bound by the first receipt, they were liable for interest from the time of that receipt in *India*; but that is not demanded on the record. Interest is there asked from the time when, without negligence, the money might have been received in *England*. Here was a second bill, the subject of a second contract; that second contract shows the nature of the first, and does not allow *Mackersy* to insist on a principle of law on which he had never before founded any right whatever. It is not stated as a fact that *Ramsay* and *Co.* had any regular correspondent in *India*, with whom their dealings were such that payment to that correspondent was payable to them. Supposing the agents in *Calcutta* had been the agents of the *Ramsays*, the Appellant would have said, in answer to their letter in which they expressed their belief that the bill will be paid, "Do not tell me that it will be paid, but get the money, for I am responsible for getting it paid." On the contrary, he writes to *Ramsays* calling for information, and they send him *Coutts's* answer to their letter.

and with that he is satisfied. There were accounts settled between these parties, and accounts bearing interest in each year.—[Lord *Cottenham*: They state that the bill has been accepted, but there is no statement that it has been paid.]—But though that is so, still *Mackersy* never in the correspondence treated the *Ramsays* as persons who, on their own responsibility, had undertaken to get the bill paid; and *Mackersy* never once answered that he had nothing to do with *Coutts* and Co., but that the *Ramsays* must get the payment, or show why payment had not been made. Yet such is the case now made in this appeal.—[Lord *Campbell*: What is the earliest date at which *Mackersy* was informed that the assignees of *Palmer* and Co. had received the money?]—There does not seem to be any notice of actual payment; but on 7th *Dec.* 1832, *Coutts* and Co. wrote a letter to the Respondents, in which they said that they had received information that the bill would be paid to their (*Coutts's*) order; and added, “We shall send out immediately the required instruction for its remittance to us.” The Respondents communicated this letter to the Appellant, observing, “When the amount is received, we will advise you.” The terms of this letter show in the clearest manner that the Respondents took no responsibility on themselves, but merely became the channel through which communications passed between the *Indian* house and the Appellant. The peculiar circumstances of the parties must be remembered. In what position must the *Ramsays* have considered themselves to stand when they received the second bill? All confidence in *India* had been destroyed. Would they have undertaken the responsibility if they were to be held liable for the acts of the persons in *India* with whom they had no

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direct correspondence, and over whom they had no control? No suggestion of such a responsibility was made in 1830, 1831, or 1832, with respect to the first bill; and the second was received on the same terms as the first. All that is now contended for is that which was argued on and decided in the Court below, that when the money was received in *India*, it was to be considered as received by *Ramsays*. That is not so on the contract, nor on the record; interest is not demanded from that date.—[Lord *Campbell*: The question of the liability to interest would not be the test of liability as an agent in receiving money.—Lord *Cottenham*: They put it on the ground that the receipt by *Alexander* is a receipt by *Coutts*, and the moment it is in the hands of *Coutts* it is to be considered in the hand of *Ramsays*.]—But it is not so alleged on the record.—[Lord *Campbell*: But if such facts are stated, and so stated as show it to be so contended, is not that sufficient?—It is not. The variation in the statements on the record materially affects the rights of the parties. Had it been so stated, we might have required *Coutts* to be made parties on the record, and have had our remedy over against them. But the Appellant here springs over *Coutts*, and tries to hold *Ramsays* liable, not for what *Coutts* had received, or for money ever remitted to *England* at all, but for what has been received by a house in *India*. The annual accounts between these parties are wholly inconsistent with the claim now set up. The whole dealings between the parties show, that till the money was remitted to this country, *Mackersy* was not to have credit for it. The judgment of the Court below must therefore be sustained.

Mr. *Kelly*, in reply:—The Respondents' arguments

on the record cannot be sustained. In the condescendence it is distinctly stated, that the balance claimed is not what is sought to be recovered on this demand alone, as there had been other dealings between the parties ; and in the closed record there is a distinct declaration that the pursuers were liable for interest on the first bill, and for the principal and interest on the second bill. And with regard to that second bill, the liability of the *Ramsays* is sufficiently alleged in the pleadings.

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The other side has not attempted to answer the cases and the principle of law, and the case of *M'Vicar* and *M'Gregor* especially has been left without notice. If that case is law, it is clear that the receipt of a sub-agent is the receipt of the agent, who thereby becomes responsible to the principal. The principle of the case is satisfactorily shown in the illustration of the country attorney and the *London* agent. The practice of such employment is so clear, that if the country attorney came up to town to do what might be done by a *London* agent, the costs thus needlessly incurred would not be allowed him on taxation. In such a case it is settled that the client must have recourse to the attorney, who can have his remedy over against the agent, but that agent is not in the first instance liable to the client. And in such a case, if the *London* agent received money due to the client, the receipt of such money by the agent would be the receipt of it by the attorney, so as to make the attorney liable to the client. And this would be so even if, as between the attorney and the agent, the money was only remitted by a transfer in account. The *Ramsays* may not be absolutely responsible for the solvency of the agents in *India*, but at all events they are liable for the agents taking all proper steps

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to get the amount of the bill, and liable when the money has been actually paid to those agents. Suppose *Coutts* had not sent the bill to *India*, but had kept it in *London*, and the drawee, who was at first solvent, had become bankrupt in the meantime *Coutts* and Co. would have been liable to *Ramsay* alone, and *Mackersy* could not have maintained an action against *Coutts* and Co., because there was no privity between them. The accounts show nothing. The *Ramsays* have not introduced the bills into the accounts, because that would have been to charge themselves with a liability they were seeking to avoid but their conduct in this respect can be no answer to the claim of the Appellant. The money here has been received by *Ramsays'* agents, for whose acts *Ramsays* are responsible, and the judgment of the Court below must therefore be reversed.

Lord Campbell:—I am of opinion that the interlocutor of the Lord Ordinary was right, and that the judgment of the Court of Session which reversed it cannot be supported. It appears that *Ramsay* and Co., in the way of their business as bankers, were employed for reward by a customer, with whom they had a cash account, to obtain payment of a bill of exchange drawn on a person in *Calcutta*, payable to their order. They did not become the owners of the bill, or discount it, but they were to receive payment of it for *Mackersy*, having a lien on the bill and its proceeds for any balance due to them from him. The payment was to be made to persons to be employed by them, to whom the bill must be indorsed. *Mackersy* was not to interfere with the proceeds of the bill till he was credited, or entitled to be credited by them for its amount. They employed as their

agents *Coutts* and Co., who employed *Alexander* and Co., who duly received payment from the acceptor, and having given *Coutts* and Co. credit in account, five months afterwards became bankrupt. I conceive that these circumstances amount, in point of law, to a payment to *Ramsay* and Co., and that they were bound to place the amount to the credit of *Mackersy*.

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The general rule of law, that an agent is liable for a sub-agent employed by him, is not confined to cases where the principal has reason to suppose that the act may be done by the agent himself without employing a sub-agent; and here I conceive that the money is to be considered as received by *Coutts* and Co., whose correspondents actually received it at *Calcutta*, and credited them with the amount five months before their failure. *Mackersy* could not have interfered with the money either in the hands of *Alexander* and Co. or of *Coutts* and Co. There was no privity between him and either of those houses; but payment to *Alexander* and Co. was payment to *Coutts* and Co., and payment to *Coutts* and Co. was payment to *Ramsay* and Co., the Respondents. I approve of the expression of the Lord Ordinary, when speaking of the receipt of the money by *Coutts*' correspondents at *Calcutta*, that "at that moment the law placed it to the credit of the defender."

The Judges of the First Division truly say that *Ramsay* and Co. had not become the owners of the bill. If by *vis major*, or *casus fortuitus*, the bill had been destroyed before it reached *Calcutta*, or if *Clelland* the drawer had become insolvent before it was paid, the loss would not have been theirs. But they might, nevertheless, be agents to receive payment, and be liable for the amount when payment had been actually received.

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We have been much pressed with the case of *Campbell v. The Bank of Scotland*, decided by Lord *Moncrieff*, a Judge for whose opinion I should entertain as much deference as for the opinion of any Judge in *Scotland* or *England*; but the facts of the case are not distinctly stated, so that we do not accurately know on what circumstances that judgment proceeded. If he had decided that in a case like this the bankers were not liable for the money received by their correspondents, I should have been bound to say, with all respect, that he had come to an erroneous conclusion.

I therefore move your Lordships that the interlocutors of the First Division of the Court of Session complained of be reversed, and that the interlocutor of the Lord Ordinary, assoilzieing the defender with the costs, be affirmed.

Lord *Cottenham*:—This case, though it does not appear to me to raise any question of difficulty, has acquired a considerable degree of importance from the manner in which the rule of law involved in it has been viewed in *Scotland*. That rule of law is of general application, and I do not find any special circumstances here which take the case out of its operation. The correspondence, if it proves any special contract, establishes only such an agreement as the law would have inferred from the dealings between the parties. The Appellant, having an open cash account with Messrs. *Ramsay*, transmitted to them two bills, drawn by himself upon Mr. *Clelland* of *Calcutta*, and made payable to them. This is an authority to them to receive the money, which in the ordinary course of business they proceeded to do, and the money was paid in pursuance of the order. From the time the bills were sent to the pursuers, the

Appellant did not interfere. It was not intended that he should do so, nor indeed could he have done so, as none of the intended agents acted under his authority; he therefore had no control over them. All that *Mackersy* undertook to do by the bills, has been accomplished. His debtor in *Calcutta* has, as directed, paid the sum for which the bills were drawn. In the ordinary course of business, therefore, the bankers to whom he delivered the bills and to whom they were payable, were bound to credit him with the amount received, and by these letters they in effect agreed to do so.

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The money in the end was lost, not by any failure on the part of *Mackersy* or of the party who had by the bills been ordered to pay the amount to the bankers, the drawers, but by the insolvency of the person in *Calcutta* who had actually received the proceeds of the bills; and this loss, the Court of Session has said, is to fall upon the drawer.

The learned Judges below do not altogether agree as to the ground upon which this judgment is founded. Lord *Gillies* thinks that the contract of the bankers was to give the credit only upon getting the payment themselves, which, as such transactions are always matters of account, would never happen; that is, if he means by payment, the receipt of the identical sum paid by the acceptor. The Lord President, indeed, puts the case upon much the same ground, saying that he could not hold that payment to *Alexander* and Co. in *Calcutta*, was the same thing as payment to the pursuer in *Edinburgh*. But Lord *Fullarton* rather relies upon the admitted fact that the bankers did not discount the bills, saying, that the result of the cases quoted was, that unless there was some clear indication of the intention of the parties at the

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time, that the bills remitted should be taken by the bankers on discount or terms equivalent to discount, they must be treated as remitted to, and taken by, the bankers as mere agents; and that he thought that there was no such indication in this case. And Lord *Mackenzie* says, the case turns upon this, that the bankers did not agree to take the bills as payment in *India*; and the interlocutor of Lord *Moncrieff*, in *Campbell v. The Royal Bank*, upon which this decision now under consideration appears to be principally rested, draws a distinction between the cases which were cited and the case before him, because in that case it must have been known that the agent could not himself have received the money.

Now, certainly, the present was not a case of discount, and there was no such special contract as is referred to by Lord *Mackenzie*; and it must have been known to the Appellant, that Messrs. *Ramsay* and Co. could not themselves go to *Calcutta* and receive the money. But none of these circumstances appears to me to be necessary, in order to entitle the Appellant to have credit with Messrs. *Ramsay* for the proceeds of those bills, actually paid by his debtor, the acceptor of the bills. I cannot distinguish this case from the ordinary transactions between parties having accounts between them. If I send to my bankers a bill or draft upon another banker in *London*, I do not expect that they will themselves go and receive the amount, and pay me the proceeds; but that they will send a clerk in the course of the day to the clearing-house, and settle the balances, in which my bill or draft will form one item. If such clerk, instead of returning to the bankers with the balance, should abscond with it, can my bankers refuse to credit me with the amount? Certainly not. If the

bill had been drawn upon a person at *York*, the case would have been the same; although, instead of the bankers employing a clerk to receive the amount, they would probably employ their correspondent at *York* to do so; and if such correspondent received the amount, am I to be refused credit because he afterwards became bankrupt whilst in debt to my bankers? If the balance were not in favour of my bankers, the question would not arise; so that my title to the credit would depend upon the state of the account between my bankers and their correspondent. The amount in money was received by the correspondent of my bankers at *York*; as between me and them, it was received by them, and nothing which might subsequently take place could deprive me of the right to have credit with them for the amount.

If this be so in a transaction between *London* and *York*, it must be the same in one between *Edinburgh* and *Calcutta*, not by virtue of any special contract, but as resulting from the letters which raised the undertaking to procure payment of the bill, if it should be accepted and honoured, and to credit the proceeds. It was accepted and honoured, and the proceeds received by those employed for the purpose by them; and the Appellant's title to credit for the amount was thereby perfected. If there was any negligence in the conduct of the parties actually employed to receive the money, it could only affect those by whom they were so immediately employed, for certainly they were not the agents of the Appellant: over them he had no control. The money received by *Alexander* and Co. properly formed an item in the account between them and Messrs. *Coutts* and Co., their employers. If a larger balance had been due to them from Messrs. *Coutts* and Co. than the

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amount of the money so received, they would have been entitled to claim the whole, as in fact they did retain part.

To solve the question, in this case, it is not necessary to go deeper than to refer to the maxim *qui facit per alium, facit per se*.

Ramsay and Co. agreed, for consideration, to apply for payment of the bill; they necessarily employed agents for that purpose, who received the amount; their receipt was in law a receipt by them, and subjected them to all the consequences. The Appellant, with whom they so agreed, cannot have anything to do with the conduct of those whom they so employed, or with the state of the account between different parties engaged in this agency.

These principles and these consequences were so much and so properly felt, that they were scarcely disputed at the bar; but it was urged that the Appellant had not put forward this case in the proceeding in such a manner as to entitle him to the benefit of it. I have for this purpose carefully examined the proceedings, and I think the objection is not well grounded. The defence states the fact of the two bills having been paid to *Alexander* and Co., the agents of *Coutts* and Co.; and the first plea in law raises the question, that under the circumstances Messrs. *Ramsay* are liable for the money so received. There is far too much in the papers about negligence, but I think there is quite sufficient to raise the question on which this case must depend; namely, the receipt by the agent being a receipt by the principal. The Lord Ordinary appears to me to have taken a very correct view of the case, in saying that both bills were paid to persons empowered by the pursuers to receive payment; at that moment the law placed

them to the credit of the defender. On these grounds it appears to me that the interlocutors of the Court should be reversed, and that of the Lord Ordinary substituted in its place.

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Mr. *S. Graham* asked, if it was their Lordships' intention that the Appellant should have his costs in the Court below.

Lord *Campbell*:—We pronounce the judgment which ought to have been pronounced by the First Division.

Lord *Brougham*:—I have no doubt about this. I shall take no part in the discussion on the merits, for I was not present at the argument; but I have no doubt that, your Lordships feeling it right to reverse the interlocutor of the Inner House, and to affirm the interlocutor of the Lord Ordinary, the costs of the proceedings in the Inner House ought to be given. You never give the costs against a party coming to defend and sustain a decree in his favour; therefore the Appellant never gets his costs here: but in this case we are putting ourselves in the place of the Court below, and giving those costs which the party ought to have had there. I think that is quite right.

Lord *Cottenham*:—We have affirmed the judgment of the Lord Ordinary, and the necessary effect of our so doing is to give the costs of the hearing in the Court below.

The following order was afterwards entered on the Journals:—"That the said interlocutors be reversed, and that the interlocutor of the Lord Ordinary, of

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the 21st *December* 1839 (mentioned in the appeal), be affirmed. And it is further ordered, that the pursuers in the action in the Court of Session (Respondents here) do pay, or cause to be paid, to the defender in such action (Appellant here), the costs of the proceedings incurred by him in prosecuting the reclaiming note before the First Division of the Court of Session. And it is further ordered, that the cause be remitted back to the Court of Session, to do therein as shall be just and consistent with this judgment."—*Lords' Journals*, 9th *March* 1843.

I N D E X.

ACTION, PARTIES TO. *See* AGREEMENT.

1. *Semble*, that the Officers of State in *Scotland* are the proper parties to pursue an action to set aside an illegal grant of the property of the Crown in that country.—*The Lord Advocate v. Lord Dunglas*, p. 173.

That such action brought by the Lord Advocate, in the name and on the behalf of the Crown, without a special warrant, is incompetent, although he obtains such warrant in the course of the proceedings.—*Id. ibid.*

That in such an action, the Lord Advocate and the Commissioners of Woods and Forests have no title to sue.—*Id. ibid.*

2. If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable, jointly and severally, for the failure and refusal.—*Ferguson v. Kinnoull, Earl*, p. 251.

Persons having judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts.—*Id. ibid.*

In such actions no allegation of malice is necessary.

The taking on his trials a presentee to a church in *Scotland*, is a ministerial act which the Presbytery is bound to perform, and for the neglect or refusal to perform which every member of the Presbytery is liable to make compensation in damages to the party injured. And he may maintain such action against the members collectively and individually.—*Id. ibid.*

ADMINISTRATOR. *See* RESIDUE.

AGENT. *See* MARRIAGE. PRINCIPAL AND AGENT.

The law agent of *A. H.* was entrusted by him with a paper, which purported to be a declaration of marriage between

A. H. and *M. C.*; and was desired, in case of his death, not to let it pass into any hands but those of *A. H.*, and in case of *A. H.*'s death to preserve it for *M. C.*, to whom, from the other circumstances of the case, the existence of the paper appeared to be known. The law agent was, on these circumstances, equally the agent of the wife as of the husband, for the purpose of the custody of this paper.—*Hamilton v. Hamilton*, p. 327.

AGREEMENT.

1. An agreement, under seal, between Lord *H.* and the Plaintiffs in Error, recited that a company had been formed for making a railway; that the Plaintiffs in Error were shareholders; that a bill had been introduced into Parliament according to which the line would pass through Lord *H.*'s estates and near his mansion, and that he opposed the passage of the bill; that Plaintiffs in Error had proposed that, if Lord *H.* would withdraw his opposition and assent to the railway, they would endeavour to deviate from the proposed line; and Lord *H.* agreed that, on condition of the stipulations in the agreement being performed, he did thereby withdraw his opposition and give his assent; and the Plaintiffs in Error covenanted that in case the said bill should be passed in the then session, they would, in six months after it received the Royal assent, pay Lord *H.* 5,000*l.* as compensation for the damage which his residence and estates would sustain from the railway passing according to the deviated line; exclusive of, and without prejudice to, further compensation in the event of the deviated line not being ultimately adopted. Lord *H.*, in consequence of these stipulations, withdrew his opposition; the bill passed in that session; and after six months had elapsed, his Lordship brought his action for the debt for the 5,000*l.*, alleging in his declaration the facts above stated; to which the Plaintiffs in Error pleaded that the railway, at the time of the agreement and according to the Act, was intended to pass through lands of diverse individuals, and the agreement was made secretly without their knowledge, and was concealed from them until the Act passed, and was concealed from the Legislature during the passing of the Act; and that Lord *H.* was a Peer of Parliament.

Held (affirming the judgment of the Court of Exchequer Chamber), that the agreement was valid, inasmuch

Lord *H.*, though a Peer, had a right to bargain in his individual character for compensation for injury to his property; and it was not shown on the record that the money was promised as a consideration for his vote being given or withheld; or that the parties to the agreement intended to conceal it from the individual landholders on the line, or from the Legislature; or that any fraud was intended or committed on any party.—*Simpson v. Lord Howden*, p. 61.

2. A deed of separation between a husband and his wife having been drawn up, but not executed by the husband; Held, that his executing such deed was a legal consideration for an agreement, by a third person, to pay a sum of money to the husband towards the discharge of certain debts and expenses, for which the husband was solely liable.—*Jones v. Waite*, p. 101.

3. *T. H.*, a merchant in partnership with *A. H.*, died in 1790, unmarried and intestate, possessed of leasehold property, and leaving his sisters Lady *S.* and Mrs. *D.* his sole next of kin. Soon after his death, the partnership was, on investigation by the creditors, found to be insolvent; and Lady *S.* and Mrs. *D.*, with consent of their husbands, duly renounced administration of his estate. By indenture made between Sir *W. S.* and his wife Lady *S.* of the first part, the said *A. H.* of the second part, and his then new partner *R.* of the third part, after reciting that the former partnership was insolvent; that *A. H.* and *R.* had undertaken to settle with the creditors by composition, which could not be effected without administration of *T. H.*'s personal estate, and that there had been money transactions between him and Sir *W. S.*, of which neither kept any account,—Sir *W. S.* and Lady *S.* renounced, at *R.*'s request, all their right to the said administration in favour of *A. H.*, who in consideration thereof covenanted, after obtaining such administration, to release Sir *W. S.* from all claims which he as administrator of *T. H.* or otherwise might have on Sir *W. S.*: And Sir *W. S.*, in consideration of such release, covenanted for himself, his heirs, executors, and administrators, and for his said wife, that they, Sir *W.* and Lady *S.*, would, after such administration should be granted to *A. H.*, execute to him, his executors and administrators, a release of all claims whatsoever which they

might have on him as administrator of *T. H.* or otherwise. The creditors also by a composition deed agreed to accept 15*s.* in the pound, payable by instalments by *A. H.* and *R.*, and to allow *A. H.* to take out administration of the estate of *T. H.* Afterwards *D.*, the husband of Mrs. *D.*, by a deed-poll, after reciting that he had an unsettled demand against *T. H.*'s estate, and that the effects of the late partnership, together with his private estate, were insufficient to pay the partnership debts, and that the creditors entered into a composition and agreement with *A. H.* and *R.* as aforesaid, declared that a bond for 1,000*l.* given to him by *A. H.* and *R.* pursuant to an agreement therein recited, should, when paid, be in full discharge of all sums of money due to him from *T. H.*, and of all claims whatsoever of him, *D.*, on the estate and effects of *T. H.* *A. H.* then took out letters of administration of *T. H.*'s estate, and, in order to pay the creditors, raised sums of money by annuities and mortgage on the said leasehold property, *R.* joining in the securities; but in 1793, being unable to pay the whole composition by what they had then received from the intestate's estate, they entered into further arrangements with the creditors, and soon afterwards dissolved partnership, *R.* remaining in exclusive possession of the leasehold premises, of which he afterwards purchased the fee-simple; and, dealing with them as his own for several years, without any interference by *A. H.*, or the said next of kin, or their husbands who survived them,—all of whom died between the years 1797 and 1815,—he (*R.*) mortgaged them in 1815 to secure debts due by him to *D.* and Co., subject to the leases possessed by the intestate; subject to which, he also in 1818 released to them the equity of redemption, and they afterwards sold the property in fee to other parties. A bill to redeem the premises was filed against these mortgagees and purchasers in 1831, by the administrator *de bonis non* of *T. H.*, claiming also as representative of the next of kin. There was no proof of the execution of a release in pursuance of the covenant by Sir *W.* and Lady *S.*, except that it appeared from their deceased attorney's bill-book that he had prepared such release.

Held by the Lords that it was immaterial whether such releases were executed or not, as the various acts of ownership exercised over the leasehold property by *A. H.*, and

and by *R.* and those deriving under him, all dealing with it as their absolute property for a period of 37 years, with the acquiescence of the next of kin and their representatives, established beyond all doubt an agreement by the next of kin to give up all their interest in it, in consideration of the arrangements of 1790.—*Sheffington v. Budd*, p. 219.

Semble, if the residue had not been so released, and time and the acts and acquiescence of the parties had not been a bar to a bill to redeem, the administrator *de bonis non* of the intestate would be entitled to sustain such bill, notwithstanding that the equity of redemption had been reserved to the original administrator's representatives; and not the administrator of *A. H.*, the former administrator.—*Id. ibid.*

ANNUITY. See EQUITIES. EVIDENCE.

1. By deed of annuity, in consideration of 9,000*l.* therein stated to be paid to *L. E. M.* and *M.*, the said *L.* granted to Messrs. *D. & H.* an annuity or clear yearly rent of 1,800*l.* for three lives, charged upon his estate; and *L. E. M.* and *M.* covenanted to pay the said annuity or yearly rent, with a proviso for repurchase by them, or any or either of them. And they executed their joint and several bond and warrant of attorney to confess judgment on the bond, the judgment to be as a further security for the annuity, and to be entered forthwith against *L.* and *E.*, but not against *M.* and *M.* until default of payment, and execution not to be entered on the judgment against *L.* and *E.* until the annuity should be 40 days in arrear; and *E.*, for further securing the annuity, agreed, in the event of not becoming purchaser of *L.*'s estate in 12 months, to assign, at *L.*'s expense, a mortgage which *E.* held on it, and also to procure the guarantie of a competent person for payment of the annuity.

Held by the Lords (reversing the decree of the Court below), that *E.* was a principal grantor of the annuity, and not a surety.—*Hollier v. Eyre*, p. 1.

The question whether a person is principal or surety in the grant of an annuity, is to be determined on the terms of the instruments; no extraneous evidence is admissible for that purpose—*Id. ibid.*

2. Decree dismissing a bill for arrears of an annuity, on the ground of presumed satisfaction and lapse of time;

varied by directing the bill to be retained for 12 months, the plaintiff to be at liberty to establish her claim in an action at law.—*Haworth v. Bostock*, p. 59.

3. A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.—*Hamilton v. Wright*, p. 111.

A trust was created by a debtor for the benefit of creditors, and the trustee had the power to bind the debtor personally and heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for the debtor. The trustee purchased an annuity granted by the debtor, after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor.—*Id. ibid.*

It was held that they could not do so, and a decree of the Court of Session, affirming their right, was reversed.—*Id. ibid.*

APPEAL. See COSTS, 1, 2. PRACTICE, 1, 3, 5.

ASSUMPSIT. See PLEADING.

BANKERS.

M. employed *R.* and Co., bankers in *Edinburgh*, to obtain for him payment of a bill drawn on a person resident at *Calcutta*. *R.* and Co. accepted the employment, and wrote promising to credit him with the money when received. *R.* and Co. transmitted the bill in the usual course of business to *C.* and Co. of *London*, and by them it was forwarded to *India*, where it was duly paid. *R.* and Co. wrote to *M.* announcing the fact of its payment, but never actually credited him in their books with the amount. The house in *India* failed.

Held that *R.* and Co. were the agents of *M.* to obtain payment of the bill; that payment having been actually made, they became *ipso facto* liable to him for the amount received; and that he was not called upon to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed.—*Mackersy v. Ramsays*, p. 818.

BILL OF EXCEPTIONS.

A Court of Error in *England*, upon a bill of exceptions brought before it by writ of error, is bound to decide on the validity of the exceptions, and to allow or disallow them; and also to correct any errors in the record to which the bill of exceptions is annexed; and to affirm or reverse the judgment of the Court below, according to law.

But such Court cannot select a part of the evidence set forth in the bill of exceptions, not being the subject of exception, and decide the cause on arguments applied to that part of the evidence, or on the consideration of its bearing on the merits of the case.

Secus, in the case of a special verdict, or demurrer to evidence. The *Irish Acts*, 28 *G.* 3, c. 31, and 40 *G.* 3, c. 39, have not given the Court of Error in *Ireland* any larger power, or different rule of law, for adjudicating on the record and bill of exceptions brought before it, than those which belong to and govern the Courts of Error in *England*.—*Lord Trimlestown v. Kemmis*, p. 774.

BURGHs. See **ROYAL BURGHs.**

CHARITIES. See **TRUST.**

CHURCH. See **ACTION.** **DEED.** **PLEADING.**

The taking on his trials a presentee to a church in *Scotland*, is a ministerial act which the Presbytery is bound to perform, and for the neglect or refusal to perform which every member of the Presbytery is liable to make compensation in damages to the party injured. And he may maintain such action against the members collectively and individually.—*Ferguson v. Kinnoull (Earl)*, p. 251.

CONSIDERATION. See **HUSBAND AND WIFE.**

CORPORATION. See **PLEADING.**

The Convention of the Royal Burghs of *Scotland* exists under the authority of an Act passed in the reign of *James 3* (A. D. 1487). It consists of commissioners or delegates from the Royal Burghs, meets annually, declares the amount of money required for certain purposes to be raised by the various burghs, holds its sittings for two or three days, provides by annual vote for its expenses, and is then dissolved. Two persons were appointed conjunct clerks of the Convention, and their appointments were declared to be “with benefit of survivorship,” and “with

survivancy to the longest liver of them ;" and the office was given to them " as freely and fully as any of their predecessors had held it ;" and the emoluments were declared to belong to one of them " during his natural life ;" the other was to have the benefit of survivorship.

The Convention in one year raised the salary of its clerks ; in another it lowered their salary below its original amount, and it also increased their duties. There were instances of express appointments " during pleasure," and of dismissals.

Held by Lords *Brougham* and *Cottenham* (Lord *Campbell* dissenting): first, that this was not a life office, for that the expressions in the appointment were explained by the circumstances under which it was made ; and secondly, that the salary might be raised or lowered at the pleasure of the Convention.

Per Lord *Campbell*:—The Convention of Royal Burghs is a corporation : on the facts of this case, and the terms of the appointment, the office is granted for life, and the Convention cannot reduce the salary below its ancient and original amount. But the Convention can reduce it to that amount, and may, perhaps, cast new duties on the officers. —*Convention of Royal Burghs of Scotland v. Cunningham, and Bell*, p. 144.

COSTS. See CROWN, OFFICERS OF. DECREE. PRACTICE.

1. Where no party appears when an appeal is called on for hearing, it will be dismissed for want of prosecution, without costs on either side.—*Sherburne v. Middleton*, p. 72.
2. Where no person appeared on behalf of an Appellant when his appeal was called on, and the agent only of the Respondent appeared, alleging that he had retained counsel and praying that the appeal might be dismissed with costs, it was so dismissed.—*Murphy v. Conway*, p. 73.
3. An Appellant had, under the decree of the Court below, paid the costs of the suit. That decree was reversed in this House, and the bill against the Appellant ordered to be dismissed with costs. Still this House would not make an order for him to be repaid such costs, but left him to apply to the Court below, on the judgment now pronounced.—*Clark v. Smith*, p. 126.
4. The Lord Advocate of *Scotland*, or other officer of the Crown, suing on behalf of the Crown, or in matters in

which the Crown is interested, is not liable to pay costs to the opposite party, even though the suit may have been improperly instituted.—*The Lord Advocate v. Lord Dun-
glas*, p. 173.

Against any judgment awarding such costs an appeal may be brought, notwithstanding the general rule that no appeal lies for costs.—*Id. ibid.*

And the Lord Advocate or other officer of the Crown, bringing that appeal, is not required to enter into recognizances to answer the costs of the appeal.—*Id. ibid.*

5. Where the judgment of the Court below is reversed in this House, and the House pronounces the judgment which ought to have been pronounced in the Court below, the effect of such judgment is to give to the Appellant the costs of the suit in the Court below, which he would have had there, had the proper judgment been pronounced in the first instance in that Court.—*Mackersy v. Ramsays*, p. 818.

This House never gives costs against a party coming to sustain a decree in his favour.—*Id. ibid.*

CROWN.

The office of chamberlain and collector of revenues payable to the Crown out of *Ettrick* Forest, was granted by *Geo. 4.*, to Lord *D.* for his life, with a yearly salary, “as well in consideration of the office as out of Royal bounty and favour,” to be paid out of the monies of the collection; and if they should be insufficient, out of the Crown revenues of other lands in *Scotland*. The salary always exceeded the monies collected, and was paid out of them and the other Crown revenues, for several years after the demise of *Geo. 4.*

Held, that the grant, under disguise of a grant of an office, was in reality a grant of a pension to endure beyond the life of the Royal grantor, and was so far an illegal alienation of the Crown property.—*The Lord Advocate v. Lord
Dunglas*, p. 173.

Semble, 1. That the Officers of State in *Scotland* are the proper parties to pursue an action to set aside an illegal grant of the property of the Crown in that country.—*Id. ibid.*

2. That such an action brought by the Lord Advocate in the name and on the behalf of the Crown, without a special warrant, is incompetent, although he obtains such warrant in the course of the proceedings.—*Id. ibid.*

3. That in such action the Lord Advocate and the Commissioners of Woods and Forests have no title to sue.—*The Lord Advocate v. Lord Dunglas*, p. 173.

Where the Crown, by any of its officers, is a party Respondent in an appeal, it is not the usage of the House of Lords to allow the counsel for the Crown a general reply, after the reply for the Appellant.—*Id. ibid.*

The Lord Advocate of *Scotland*, or other officer of the Crown, suing on behalf of the Crown, or in matters in which the Crown is interested, is not liable to pay costs to the opposite party, even though the suit may have been improperly instituted.—*Id. ibid.*

Against any judgment awarding such costs an appeal may be brought, notwithstanding the general rule that no appeal lies for costs.—*Id. ibid.*

And the Lord Advocate or other officer of the Crown bringing that appeal, is not required to enter into recognizances to answer the costs of that appeal.—*Id. ibid.*

DECREE.

W. C. being seised in fee simple of divers parcels of lands and other hereditaments, all subject to an annuity for the life of his mother and to a portion for his brother, mortgaged one parcel and sold others. Under a decree afterwards made against *W. C.* for raising the portion, several parcels of the then unsold lands, including the mortgaged premises, were sold in the Master's office, subject to the annuity, but the deeds of conveyance to the purchasers did not state whether exclusively subject thereto, or rateably with other parcels that still remained unsold. The mortgagee's representative filed a bill against these purchasers and *W. C.*, for an indemnity for the mortgage out of the unsold lands, free from the annuity, charging that, by agreement between these defendants, the parcels sold in the Master's office were to be exclusively subject thereto, and on that account produced less by the value of the annuity than if they were sold subject thereto rateably with the parcels that still remained unsold. There was no proof in the cause of the alleged agreement.

Held, that a decree directing inquiries as to the value of the parcels sold by the Master was erroneous, as such inquiries were immaterial to the issue between the parties; and that the bill ought to have been dismissed, with costs, with-

out prejudice to any bill that might be afterwards filed for apportioning the annuity on all the lands originally charged therewith.—*Siree v. Kirwan*, p. 716.

DEED, CONSTRUCTION OF.

By deeds, executed in 1704, *Lady Hewley* conveyed estates to trustees upon trust, to pay out of the rents such sums, yearly or otherwise, to such poor and godly preachers for the time being of *Christ's* holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of *Christ's* holy Gospel, as the trustees for the time being should think fit; and to dispose of such sums, and in such manner, for promoting the preaching of *Christ's* holy Gospel in such poor places as the trustees for the time being should think fit; and also to dispose of such sums as exhibitions for educating such young men designed for the ministry of *Christ's* holy Gospel, as the trustees for the time being should approve and think fit; and to dispose of the remainder of the said rents in relieving such godly persons in distress, being fit objects of her and the trustees' charity, as the trustees for the time being should think fit: And she directed that when any one of the trustees should die, the survivors should elect in his place such a person as they in their judgments and consciences should think fit to be a trustee.

By other deeds, executed in 1707, *Lady Hewley* conveyed other estates to the same trustees, partly for the support of poor old people in an almshouse, for the management of which she appointed other trustees; and after directing that the trustees and managers should observe the rules which she should leave for the selection and government of the poor people therein, she ordered the residue of the rents to be applied upon trusts, which were the same as those contained in the deeds of 1704. By the rules left by her for the selection of the old people for the almshouse, she ordered that none be admitted but such as should be poor and piously disposed, and of the Protestant religion, and able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and *Bowles's* Catechism.

At the dates of the deeds all religious sects tolerated by law believed in the Trinity; but in the course of time the estates became vested in trustees most of whom were

Unitarians, and they applied the rents for the benefit of Unitarians; and that sect became tolerated by law.
 Held by the Lords, affirming judgments of the Court of Chancery, on an information filed in 1830, that neither Unitarians nor members of the Church of *England*, but Protestant Dissenters only, were entitled to the benefit of the charities; and that all the trustees were properly removed, as all had concurred in the misapplication of the charity funds.—*Shore v. The Attorney-general*, p. 355.

DEVISE. See WILL.

ENROLMENT.

The House, if the objection is taken, will not hear an appeal against any order or decree of the Court of Chancery that is not enrolled. And if the appeal be against a stale order or decree, time to enrol it will not be granted unless the merits appear to be with the Appellant.—*Broadhurst v. Tunnickliff*, p. 71.

EQUITIES.

Any equities between grantors of an annuity are not to affect the grantees, unless they have distinct notice of them at the time of the grant.—*Hollier v. Eyre*, p. 1.

ESTATE, VESTING OF.

A testator gave all his real and personal estates to trustees; and as to his lands at *W.*, which he held in fee simple, he directed that the trustees should stand seised thereof, in trust to convey the same to *G. H. A.*, "when and as soon as he should attain his age of 21 years;" but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at *W.*, given and devised to him, should sink into the residue of the testator's real and personal estates: and he gave the residue to *J. C.* At the testator's death *G. H. A.* was only 12 years of age.

Held, that an equitable estate in fee in the lands at *W.* vested in *G. H. A.* immediately on the testator's death, liable to be divested in the event of his dying under 21 without leaving issue of his body.—*Phipps v. Ackers*, p. 583.

ETTRICK FOREST.

The office of Chamberlain and Collector of revenues payable to the Crown out of *Ettrick* Forest, was granted by *Geo. 4.*

to Lord *D.* for his life, with a yearly salary, "as well in consideration of the office as out of Royal bounty and favour," to be paid out of the monies of the collection; and if they should be insufficient, out of the Crown revenues of other lands in *Scotland*. The salary exceeded the monies collected, and was paid out of them and the other Crown revenues, for several years after the demise of *Geo. 4.*

Held, that the grant, under disguise of a grant of an office, was in reality a grant of a pension, to endure beyond the life of the Royal grantor, and was so far an illegal alienation of the Crown property.—*The Lord Advocate v. Lord Douglas*, p. 173.

EVIDENCE. See DEED, CONSTRUCTION OF.

1. The question whether a person is principal or surety in the grant of an annuity, is to be determined on the terms of the instruments; no extraneous evidence is admissible for that purpose.—*Hollier v. Eyre*, p. 1.
2. Part of an old indenture relating to lands the subject of a suit, appearing to have been severed with a sharp instrument, formerly in the custody of the Plaintiff's steward until litigation commenced between them, afterwards handed over to the succeeding steward, from whose custody it is produced at the trial, is admissible in evidence against the Plaintiff in support of the case of the Defendant, who derived title from the former steward.—*Lord Trimlestown v. Kemmis*, p. 774.

The objection that a deed tendered in evidence has been mutilated, applies rather to the value of the evidence than to its admissibility.—*Id.* p. 775.

If a deed is admissible in evidence for any purpose, an exception to it ought not to be allowed.—*Id.* p. 776.

Declarations made by a party in possession of an estate, in his answer to a bill in Chancery, are admissible in evidence against him, and persons deriving from him; but declarations by him of what he heard another person state, he not adding that he believed the statement, are not admissible to cut down or defeat his estate.—*Id.* p. 780.

EXCEPTIONS, BILL OF.

If, upon a bill of exceptions to the Judge's charge to the jury,

the superior Court should see that there was a misdirection calculated to mislead the jury in the verdict, the Court has no discretion, but must allow the exception and direct a new trial, even though the verdict may be right.—

Househill Coal Company v. Neilson, p. 788.

Secus, in case of a motion for a new trial on the ground of misdirection.

The 5th section of the Act 5 & 6 W. 4, c. 83, requiring a defendant to an action for infringing a patent, to give the plaintiff notice of the objections on which he means to rely at the trial, does not apply to *Scotland*; the practice there, of confining the evidence at the trial to the averments on the record, being a sufficient protection against surprise.

Held, that the want of such averments on the record, cannot be supplied by a notice of objections lodged in process.—*Id. ibid.*

FRAUD. *See* AGREEMENT.

FUND IN COURT.

A suit was instituted in the Court of Chancery in *Ireland* by the trustees of *A.*'s will, for carrying the trusts thereof into execution, and for administration of his estate; and *B.*, one of the defendants thereto, and who was entitled to the residue of *A.*'s estate, having died before decree, bills of revivor, and supplement and amendment, were filed by the plaintiffs in the original suit, against *B.*'s personal representatives, and against all the parties interested under his will in his real and personal estates; and a decree was made directing accounts to be taken of the personal estates, debts, and legacies of *A.* and of *B.* respectively. By a subsequent decree, affirmed by the House of Lords, certain unpaid legacies of *B.*, and the interest on them, were declared, in the event of his personal estate being found insufficient, to be charged on his real estates; the principal not to be raised until after the death of *C.*, the tenant for life thereof under *B.*'s will, but the interest to be paid out of the rents and profits during *C.*'s life. On a question subsequently arising between *C.*, and *D.* the tenant-in-tail of the real estates after *C.*'s life estate, whether a fund in Court, part of *B.*'s personal estate, should be applied exclusively in payment of arrears of interest on the legacies, or rateably in payment of the legacies and of the interest;

the Master of the Rolls and Lord Chancellor of *Ireland* made orders directing the fund to be applied exclusively in payment of the arrears of interest ; and the Lord Chancellor refused to direct an inquiry as to how much of the fund in Court was principal, and how much accumulated interest.

Held, on appeal against these orders, that any question as to the application of *B.*'s personal estate could not be regularly adjudicated in this form of suit, between the co-defendants *C.* and *D.* ; and the orders appealed from were affirmed, with a variation and declaration that they should be without prejudice to any question between *C.* and *D.* as to the manner in which the principal and interest of the legacies should be paid.—*Coote v. Trench*, p. 74.

GRANT. See OFFICER. COSTS, 4.

1. The Officers of State in *Scotland* are the proper parties to pursue an action to set aside an illegal grant of the property of the Crown in that country.
2. That such an action brought by the Lord Advocate in the name and on the behalf of the Crown, without a special warrant, is incompetent, although he obtains such warrant in the course of the proceedings.
3. That in such action the Lord Advocate and the Commissioners of Woods and Forests have no title to sue.—*The Lord Advocate v. Lord Dunglas*, p. 173.

HEIR.

E. C., by his will, dated in 1786, gave his estate of *T.* to certain persons for life, and after their decease to his kinsman *J. C.*, or his male heir ; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of his uncle *R. C.*'s family, yielding and paying to such of the daughters of the aforesaid *R. C.* which should be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estates. The testator died in 1787 : *R. C.* died six years before, having left five daughters only, all married : the eldest had several daughters, but no son ; each of the others had sons ; all these persons were known to the testator. The eldest daughter of *R. C.* died in 1799, having no son, but leaving a daughter who had a son born in 1795, both still living. The second died in November 1782, having had two sons ; one born in 1763, who died in 1817 ; the second born in

1770, still living. The third died in 1813, leaving two sons; one born in 1771, who died in 1813; the other born in 1773, still living. The fourth died in 1804, leaving a son born in 1768, who died in 1819. The fifth, still living, had a son born in 1772, who is still living. The life estate in the devised lands expired in *July* 1820. Held, 1st, that the remainder devised to the first male heir of the branch of *R. C.*'s family, was a contingent remainder in fee simple. 2dly, that such remainder, if once vested, could not become divested so as to admit another person in preference to him in whom it had vested. 3dly, that the said remainder did not vest in *R. C.*'s second daughter's son, in preference to his first daughter's grandson.—*Doe v. Winter v. Perratt*, p. 606.

Quære, as between the titles of the grandson of *R. C.*'s eldest daughter, and the son of *R. C.*'s fourth daughter. Lord *Brougham* was of opinion, supported by five Judges,—1st, that the words "first male heir" were not used by the testator to denote a person of whom an ancestor might be living, but meant an heir of a deceased ancestor in a technical sense. 2dly, that the said remainder first vested in interest, on the death of *R. C.*'s fourth daughter in 1804, in her son. Lord *Cottenham*, supported by six Judges, was of opinion,—1st, that the words "first male heir" were used to denote a person of whom an ancestor might be living. 2dly, that the said remainder did not first vest in interest in *R. C.*'s fourth daughter's son. His Lordship did not say when or in whom it vested. Two of these Judges said it vested in the first daughter's grandson, on that daughter's death in 1799; two others said it then vested in *R. C.*'s second daughter's son; and the remaining two said that the will was in that respect void for uncertainty.—*Id. ibid.*

HUSBAND AND WIFE.

A deed of separation between a husband and his wife having been drawn up, but not executed by the husband;

Held, that his executing such deed was a legal consideration for an agreement by a third person to pay a sum of money to the husband, towards the discharge of certain debts and expenses for which the husband was solely liable.—*Jones v. Waite*, p. 101.

JUDICIAL FUNCTIONS. *See* ACTION, 4.

INQUIRIES BEFORE THE MASTER. *See* DECREE.

LEASE. *See* POWER.

LEGACIES.

1. A suit was instituted in the Court of Chancery in *Ireland*, by the trustees of *A.*'s will, for carrying the trusts thereof into execution, and for administration of his estate: and *B.*, one of the defendants thereto, and who was entitled to the residue of *A.*'s estate, having died before decree, bills of revivor, and supplement and amendment, were filed by the plaintiffs in the original suit, against *B.*'s personal representatives, and against all the parties interested under his will in his real and personal estates; and a decree was made directing accounts to be taken of the personal estates, debts, and legacies, of *A.* and of *B.* respectively. By a subsequent decree, affirmed by the House of Lords, certain unpaid legacies of *B.*, and the interest on them, were declared, in the event of his personal estate being found insufficient, to be charged on his real estates; the principal not to be raised until after the death of *C.*, the tenant for life thereof under *B.*'s will, but the interest to be paid out of the rents and profits during *C.*'s life. On a question subsequently arising between *C.*, and *D.* the tenant-in-tail of the real estates after *C.*'s life estate, whether a fund in Court, part of *B.*'s personal estate, should be applied exclusively in payment of arrears of interest on the legacies, or rateably in payment of the legacies and of the interest; the Master of the Rolls and Lord Chancellor of *Ireland* made orders directing the fund to be applied exclusively in payment of the arrears of interest; and the Lord Chancellor refused to direct an inquiry as to how much of the fund in Court was principal, and how much accumulated interest.

Held, on appeal against these orders, that any question as to the application of *B.*'s personal estate could not be regularly adjudicated in this form of suit, between the co-defendants *C.* and *D.*; and orders appealed from were affirmed, with a variation and declaration that they should be without prejudice to any question between *C.* and *D.* as to the manner in which the principal and interest of the legacies should be paid.—*Coote v. Trench*, p. 74.

2. A testator bequeathed to trustees a sum of 15,000*l.* in the three *per cent.* consols, to be deemed a legacy of quantity,

and to be due at his death as if the same was a specific legacy ; and he directed that, if he should not die possessed of three *per cent.* consols sufficient to satisfy the said sum, his executors should, within two months after his decease, purchase so much consols as should make up the deficiency or full amount thereof, as the case might require ; and he created a term in his real estates, one trust of which was to raise the full amount or deficiency of the said sum of consols, in case he should not have at his decease a sufficient sum in that fund to answer the legacy. The will was dated in 1832 ; the testator died in 1835, leaving only 3,000*l.* three *per cent.* consols, which had been purchased in 1834 : he had in 1824 sold out 12,000*l.* consols, which then stood in his name, and paid the produce to his brother upon mortgage of freehold estates, subject to redemption by retransferring or replacing, on request, 12,000*l.* consols into the name of the testator or his executors, and on payment of interest equal to the dividends, until replaced.

Held (affirming decrees of the Vice-Chancellor and Lord Chancellor), that the 12,000*l.* consols, secured by the mortgage to be replaced, were well bequeathed to make up the legacy of 15,000*l.* three *per cent.* consols.—*Collison v. Curling*, p. 88.

MALE HEIR. See HEIR.

MARRIAGE.

M. C., an unmarried woman, while living with her mother, had two children by *A. H.*, a single man, who gave bond to the parish to indemnify it against their maintenance. He afterwards changed his own residence, and *M. C.* went, with her two children, to reside in his house, and so resided till his death. Shortly after this change of residence he obtained from his law agent a form of words necessary, by the *Scotch* law, to constitute a marriage. He then wrote this note : "My dearest *May*,—I hereby solemnly declare that you are my lawful wife, though for particular reasons I wish our marriage to be kept private for the present. I am your affectionate husband, *A. H.*" This note was addressed inside to "*M. C.*," but outside to "*Mrs. A. H.*" He deposited the note with the law agent, saying, "it would please and satisfy her," but directed the agent to keep it a secret till his, *A. H.*'s, death. *A. H.* always represented himself to his relations as a single man.

Held that a valid marriage had been constituted between these parties; that the words of the paper were sufficient for that purpose, so far as the man was concerned; and that his conduct and expressions to the law agent, together with the subsequent residence of the woman with him, must be taken as evidence of her knowledge of the paper, and her assent to it.—*Hamilton v. Hamilton*, p. 327.

The law agent was, under the circumstances, here equally the agent of the wife as of the husband, for the purpose of the custody of this paper.—*Id. ibid.*

MINISTERIAL FUNCTIONS. *See* ACTION, 4.

OFFICE.

1. The office of Chamberlain and Collector of revenues payable to the Crown out of *Ettrick* Forest, was granted by *Geo. 4.* to Lord *D.* for his life, with a yearly salary, "as well in consideration of the office as out of Royal bounty and favour," to be paid out of the monies of the collection; and if they should be insufficient, out of the Crown revenues of other lands in *Scotland*. The salary exceeded the monies collected, and was paid out of them and the other Crown revenues, for several years after the demise of *Geo. 4.*

Held, that the grant, under disguise of a grant of an office, was in reality a grant of a pension, to endure beyond the life of the Royal grantor, and was so far an illegal alienation of the Crown property.—*The Lord Advocate v. Lord Dunglas*, p. 173.

2. The Convention of the Royal Burghs of *Scotland* exists under the authority of an Act passed in the reign of *James 3* (A. D. 1487.) It consists of commissioners or delegates from the Royal Burghs, meets annually, declares the amount of money required for certain purposes to be raised by the various burghs, holds its sittings for two or three days, provides by annual vote for its expenses, and is then dissolved. Two persons were appointed conjunct clerks of this Convention, and their appointments were declared to be "with benefit of survivorship," and "with survivancy to the longest liver of them," and the office was given to them "as freely and fully as any of their predecessors had held it," and the emoluments were declared to belong to one of them "during his natural life;" the other was to have the benefit of survivorship. The

Convention in one year raised the salary, and in another it lowered that salary, below the amount and it also increased their duties. The Convention express appointments "during pleas Held by Lords *Brougham* and *Cotterell* (dissenting):—First, that this was not an expression in the appointment in the circumstances under which it was that the salary might be raised or lowered by the Convention.

Per Lord *Campbell*:—The Convention is a corporation: on the facts of this case, the office is granted for a term of years, and the Convention cannot reduce the salary below the amount. But the Convention can raise and may, perhaps, cast new duties on the Convention of *Royal Burghs of Scotland* and *Bell*, p. 144.

OFFICERS OF STATE IN SCOTLAND

PARTIES TO.

- Semble*, 1. That the Officers of State are proper parties to pursue an action for the grant of the property of the Crown.
2. That such an action brought by the name and on the behalf of the Crown, is incompetent, although it is in the course of the proceedings.
3. That in such action the Lord Advocate, the Commissioners of Woods and Forests have no locus standi. *Lord Advocate v. Lord Dunlop*, 10 Cl. & F. 100.

PATENT.

A person, to be entitled to a patent must be the *first* and *true* inventor; and must not be in public use there of by himself or others before the date of the patent.

Trials of an incomplete invention, by the evidence of "prior use" for the purpose of obtaining a patent. Prior use, for that purpose, is not evidence of the invention.

Evidence of the existence of a complete invention, although abandoned or discontinued, but not altogether lost, is

invalidate a patent subsequently granted for the same invention.

Held, therefore, that on the trial of an issue "whether an invention described in a patent is not the original invention of the patentee," it is an erroneous direction in law to the jury to charge them that the evidence of prior public use, to invalidate the patent, must show that "the use was continued to the time when the patent was granted; not to the very exact period, but that it must have been known and used as a useful thing at the time."—*Househill Coal Company v. Neilson*, p. 788.

PEER.

A Peer of Parliament has a right to bargain in his individual character for compensation for injury to his property; and where, therefore, he agreed on certain conditions to withdraw his opposition to a railway bill, and to give his assent to it, but it was not shown on the record that the money to be paid him was promised at a consideration for his vote being withheld or given, or that the parties to the agreement intended to conceal it from the individual landowners on the line, or from the Legislature, or that any fraud was intended or was committed on any party; he was allowed to enforce such agreement at law.—*Simpson v. Lord Howden*, p. 61.

PLEADING.

A deed of separation between a husband and his wife having been drawn up, but not executed by the husband;

Held that his executing such deed was a legal consideration for an agreement, by a third person, to pay a sum of money to the husband towards payment of certain debts and expenses, for which the husband was solely liable.—*Jones v. Waite*, p. 101.

If the law casts any duty upon a person which he refuses or fails to perform, he is answerable in damages to those whom his refusal or failure injures. If several are jointly bound to perform the duty, they are liable, jointly and severally, for the failure and refusal.

Persons having judicial functions, but being also required to perform ministerial acts, may be sued for damages occasioned by their neglect or refusal to perform such ministerial acts.

In such action no allegation of malice is necessary—*Ferguson v. Kinnoull (Earl)*, p. 251.

PENSION. *See* OFFICE.

POWER.

On the marriage of *T. P.*, a settlement was made of certain lands held on a lease for lives renewable for ever. The settlement gave *T. P.* an estate for life, and contained the following power of leasing: "It shall be lawful for *T. P.* and all and every other person or persons to whom any use is hereby limited, when in actual possession of the said lands, &c., to demise the said lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, &c. *T. P.* granted a lease to *A. P.* at a farm-rent, for the lives of three persons therein named; with a covenant, that on failure of any of the three lives, the lessor, his heirs and assigns, would, on the payment of 5 *l.* as a fine upon each life that should happen to die, add to the time and term of the lease the life of another person, nominated by the lessee, from time to time successively for ever.

Held that this lease was not warranted by the power; and a decree by the Court of Chancery in *Ireland*, directing specific performance of the covenant of renewal, was reversed, and the bill ordered to be dismissed with costs.—*Clark v. Smith*, p. 126.

PRACTICE. *See* ANNUITY, 2. COSTS.

1. Supplemental cases need not be lodged upon reviving an appeal which became abated after a full hearing.—*Hollier v. Eyre*, p. 1.
2. Decree dismissing a bill for arrears of an annuity, on the ground of presumed satisfaction and lapse of time; varied by directing the bill to be retained for 12 months, the plaintiff to be at liberty to establish her claim in an action at law.—*Haworth v. Bostock*, p. 59.
3. Where no party appears when an appeal is called on for hearing, it will be dismissed for want of prosecution, without costs on either side.—*Sherburne v. Middleton*, p. 72.
4. The House will not hear an appeal against any order or decree of the Court of Chancery that is not inrolled, if the objection is taken. And if the appeal be against a stale order or decree, time to inrol it will not be granted unless

the merits appear to be with the Appellant.—*Broadhurst v. Tummickiff*, p. 71.

5. Where no person appears on the part of an Appellant, when his appeal is called on, and the agent only of the Respondent appears, alleging that he had retained counsel, and praying that the appeal be dismissed with costs, it will be dismissed with costs.—*Murphy v. Conway*, p. 73.
6. An Appellant had, under the decree of the Court below, paid the costs of a suit. That decree was reversed in this House, and the bill against the Appellant ordered to be dismissed with costs. This House, however, would not make an order for him to be repaid such costs, but left him to apply to the Court below on the judgment now pronounced.—*Clark v. Smith*, p. 126.
7. Where the Crown, by any of its officers, is a party Respondent in an appeal, it is not the usage of the House of Lords to allow the counsel for the Crown a general reply, after the reply for the Appellant.—*Lord Advocate v. Lord Dunglas*, p. 174.
8. Where the judgment of the Court below is reversed in this House, and the House pronounces the judgment which ought to have been pronounced in the Court below, the effect of such judgment is to give to the Appellant the costs of the suit in the Court below, which he would have had there, had the proper judgment been pronounced in the first instance in that Court.

This House never gives costs against a party coming to sustain a decree in his favour.—*Mackersy v. Ramsays*, p. 818.

9. If upon a bill of exceptions to the Judge's charge to the jury, the superior Court should see that there was a misdirection calculated to mislead the jurors in their verdict, the Court has no discretion, but must allow the exception and direct a new trial, even though the verdict may be right.—*Househill Coal Company v. Neilson*, p. 788.

Secus, in case of a motion for a new trial on the ground of misdirection.—*Id. ibid.*

The 5th section of the Act 5 & 6 W. 4, c. 83, requiring a defendant to an action for infringing a patent, to give the plaintiff notice of the objections on which he means to rely at the trial, does not apply to *Scotland*; the practice there, of confining the evidence at the trial to the averments on the record, being a sufficient protection against surprise.

Held, that the want of such averments on the record, cannot be supplied by a notice of objections lodged in process.—*Househill Coal Company v. Neilson*, p. 788.

PRINCIPAL AND AGENT.

M. employed *R.* and Co., bankers in *Edinburgh*, to obtain for him payment of a bill drawn on a person resident at *Calcutta*. *R.* and Co. accepted the employment, and wrote promising to credit him with the money when received. *R.* and Co. transmitted the bill in the usual course of business to *C.* and Co. of *London*, and by them it was forwarded to *India*, where it was duly paid. *R.* and Co. wrote to *M.* announcing the fact of its payment, but never actually credited him in their books with the amount. The house in *India* failed.

Held, that *R.* and Co. were the agents of *M.* to obtain payment of the bill; that payment having been actually made, they became *ipso facto* liable to him for the amount received; and that he could not be called on to suffer any loss occasioned by the conduct of their sub-agents, as between whom and himself no privity existed.—*Mackerray v. Ramsays*, p. 818.

PRINCIPAL AND INTEREST. *See* FUND IN COURT. LEGACIES.

RELEASE. *See* RESIDUE.

RESIDUE, RELEASE OF.

T. H., a merchant in partnership with *A. H.*, died in 1790, unmarried and intestate, possessed of leasehold property, and leaving his sisters *Lady S.* and *Mrs. D.* his sole next of kin. Soon after his death, the partnership was, on investigation by the creditors, found to be insolvent; and *Lady S.* and *Mrs. D.*, with consent of their husbands, duly renounced administration of his estate. By indenture made between *Sir W. S.* and his wife *Lady S.* of the first part, the said *A. H.* of the second part, and his then new partner *R.* of the third part,—after reciting that the former partnership was insolvent; that *A. H.* and *R.* had undertaken to settle with the creditors by composition, which could not be effected without administration of *T. H.*'s personal estate, and that there had been money transactions between him and *Sir W. S.*, of which neither kept any account,—*Sir W. S.* and *Lady S.* renounced, at *R.*'s request, all

their right to the said administration in favour of *A. H.*, who in consideration thereof covenanted, after obtaining such administration, to release Sir *W. S.* from all claims which he as administrator of *T. H.* or otherwise might have on Sir *W. S.*: And Sir *W. S.*, in consideration of such release, covenanted for himself, his heirs, executors, and administrators, and for his said wife, that they, Sir *W. S.* and Lady *S.*, would, after such administration should be granted to *A. H.*, execute to him, his executors and administrators, a release of all claims whatsoever which they might have on him as administrator of *T. H.* or otherwise. The creditors also by a composition deed agreed to accept 15*s.* in the pound, payable by instalments by *A. H.* and *R.*, and to allow *A. H.* to take out administration of the estate of *T. H.* Afterwards *D.*, the husband of Mrs. *D.*, by a deed-poll,—after reciting that he had an unsettled demand against *T. H.*'s estate, and that the effects of the late partnership, together with his private estate, were insufficient to pay the partnership debts, and that the creditors entered into a composition and agreement with *A. H.* and *R.* as aforesaid,—declared that a bond for 1,000*l.* given to him by *A. H.* and *R.* pursuant to an agreement therein recited, should, when paid, be in full discharge of all sums of money due to him from *T. H.*, and of all claims whatsoever of him, *D.*, on the estate and effects of *T. H.* *A. H.* then took out letters of administration of *T. H.*'s estate, and, in order to pay the creditors, raised sums of money by annuities and mortgage on the said leasehold property, *R.* joining in the securities; but in 1793, being unable to pay the whole composition by what they had then received from the intestate's estate, they entered into further arrangements with the creditors, and soon afterwards dissolved partnership, *R.* remaining in exclusive possession of the leasehold premises, of which he afterwards purchased the fee simple; and, dealing with them as his own for several years, without any interference by *A. H.*, or the said next of kin, or their husbands who survived them,—all of whom died between the years 1797 and 1815,—he (*R.*) mortgaged them in 1815 to secure debts due by him to *D.* and Co., subject to the leases possessed by the intestate; subject to which, he also in 1818 released to them the equity of redemption, and they afterwards sold the property

in fee to other parties. A bill to redeem the premises was filed against the mortgagees and purchasers in 1831, by the administrator *de bonis non* of *T. H.*, claiming title also as representative of the next of kin. There was no direct proof that *T. H.*'s next of kin executed releases of their interest in the residue of his estate.

Held by the Lords that, under the circumstances, and after so long a time, and acquiescence by all parties in *H.*'s dealings with the property, such release might well be presumed, and that the same and the deed-poll executed by *D.* amounted to releases of their interest, in right of their respective wives, in the residue of the personal estate of the intestate, although such residue was not mentioned in either deed.—*Skeffington v. Budd*, p. 219.

Semble, if the residue had not been so released, and time and the acts and acquiescence of the parties had not been a bar to a bill to redeem, the administrator *de bonis non* of the intestate would be entitled to sustain such bill; notwithstanding that the equity of redemption had been reserved to the original administrator's representatives.—*Id. ibid.*

ROYAL BURGHS.

The Convention of the Royal Burghs of *Scotland* exists under the authority of an Act passed in the reign of *James 3* (A. D. 1487). It consists of commissioners or delegates from the Royal Burghs, meets annually, declares the amount of money required for certain purposes to be raised by the various burghs, holds its sittings for two or three days, provides by annual vote for its expenses, and is then dissolved. Two persons were appointed conjunct clerks of this Convention, and their appointments were declared to be "with benefit of survivorship," and "with survivancy to the longest liver of them;" and the office was given to them "as freely and fully as any of their predecessors had held it;" and the emoluments were declared to belong to one of them "during his natural life;" the other was to have the benefit of survivorship. The Convention in one year raised the salary of its clerks, in another it lowered that salary below its original amount, and it also increased their duties. There were instances of express appointment "during pleasure," and of dismissals. Held by Lords *Brougham* and *Cottenham* (Lord *Campbell* dissenting): First, that this was not a life office, for that the

expressions in the appointments were explained by the circumstances under which it was made; and secondly, that the salary might be raised or lowered, at the pleasure of the Convention.

Per Lord Campbell:—The Convention of Royal Burghs is a corporation: on the facts of this case, and the terms of the appointment, the office is granted for life, and the Convention cannot reduce the salary below its ancient and original amount. But the Convention can reduce it to that amount, and may perhaps cast new duties on the officers.—*The Convention of Royal Burghs of Scotland v. Cunningham and Bell*, p. 144.

SCOTLAND. *See* ACTION, PARTIES TO.

SEPARATION. *See* HUSBAND AND WIFE.

SPECIFIC PERFORMANCE.

On the marriage of *T. P.*, a settlement was made of certain lands held on a lease for lives renewable for ever. The settlement gave *T. P.* an estate for life, and contained the following power of leasing: "It shall be lawful for *T. P.*, and all and every other person or persons to whom any use is hereby limited, when in actual possession of the said lands, &c., to demise the said lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, &c. *T. P.* granted a lease to *A. P.* at a farm-rent, for the lives of three persons therein named; with a covenant, that on failure of any of the three lives, the lessor, his heir and assigns, would on the payment of 5*l.* as a fine upon each life that should happen to die, add to the time and term of the lease the life of another person, nominated by the lessee, from time to time successively for ever.

Held that this lease was not warranted by the power; and a decree by the Court of Chancery in *Ireland*, ordering specific performance of the covenant of renewal, was reversed, and the bill ordered to be dismissed, with costs.—*Clark v. Smith*, p. 126.

TRUSTS AND TRUSTEES.

1. A trustee is bound not to do anything which can place him

in a position inconsistent with the interests of the trust, or which can have a tendency to interfere with his duty in discharging it. Neither the trustee nor his representative can be allowed to retain an advantage acquired in violation of this rule.—*Hamilton v. Wright*, p. 111.

A trust was created by a debtor for the benefit of creditors, and the trustee had the power to bind the debtor personally and heritably for the benefit of the trust. By the terms of the trust deed, the trustee was likewise required to do all in his power to keep the residue of the trust estate as large as possible for the debtor. The trustee purchased an annuity granted by the debtor, after the date of the trust deed. The trustee died. His representatives sought to enforce the annuity against the grantor.

It was held that they could not do so; and a decree of the Court of Session, affirming their right, was reversed.—*Id. ibid.*

2. By deeds, executed in 1704, Lady *Hewley* conveyed estates to trustees upon trust, to pay out of the residuary rents such sums, yearly or otherwise, to such poor and godly preachers for the time being of *Christ's* holy Gospel, and to such poor and godly widows for the time being of poor and godly preachers of *Christ's* holy Gospel, as the trustees for the time being should think fit; and to dispose of such sums, and in such manner, for promoting the preaching of *Christ's* holy Gospel in such poor places as the trustees for the time being should think fit; and also to dispose of such sums as exhibitions for educating such young men designed for the ministry of *Christ's* holy Gospel as the trustees for the time being should approve and think fit; and to dispose of the remainder of the said rents in relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit. And she directed that when any one of the trustees should die, the survivors should elect in his place such a person as they in their judgments and consciences should think fit to be a trustee.

By other deeds, executed in 1707, Lady *Hewley* conveyed other estates to the same trustees, partly for the support of poor old people in an almshouse, for the management of which she appointed other trustees; and after directing

that the trustees and managers should observe the rules which she should leave for the selection and government of the poor people therein, she directed the residue of the rents to be applied upon trusts, which were the same as those contained in the deeds of 1704.

By the rules left by Lady *Henley* to be observed about the qualifications of the old people for the almshouse, she ordered that none be admitted but such as should be poor and piously disposed, and of the Protestant religion; and able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and Mr. *Edward Bowles's* Catechism.

At the dates of the deeds all religious sects tolerated by law believed in the Trinity; but in the course of time the estates became vested in trustees of whom the majority were Unitarians,—one being of the Church of *England*,—and they applied the rents for the benefit of Unitarians; and that sect became tolerated by law.

Held—affirming judgments of the Court of Chancery, on an information filed in 1830—that neither Unitarians nor members of the Church of *England*, but Protestant Dissenters only, were entitled to the benefit of the charities, and that all the trustees were properly removed, as all had concurred in the misapplication of the charity funds.—*Shore v. The Attorney-general*, p. 355.

VESTING. See HEIR.

WILL.

1. A testator bequeathed to trustees a sum of 15,000*l.* in the three *per cent.* consols, to be deemed a legacy of quantity and to be due at his death as if the same was a specific legacy; and he directed that, if he should not die possessed of three *per cent.* consols sufficient to satisfy the said sum, his executors should, within two months after his decease, purchase so much consols as should make up the deficiency or full amount thereof, as the case might require: and he created a term in his real estates, one trust of which was to raise the full amount or deficiency of the said sum of consols, in case he should not have at his decease a sufficient sum in that fund to answer the legacy. The will was

dated in 1832; the testator died in 1835, having only 3,000*l.* three *per cent.* consols, which had been purchased in 1824: he had in 1824 sold out 12,000*l.* consols, which then stood in his name, and paid the produce to his brother, upon mortgage of freehold estates, subject to redemption by retransferring or replacing, on request, 12,000*l.* consols, in the name of the testator or his executors, and payment of interest equal to the dividends, until replaced.

Held (affirming the Vice-Chancellor's and Lord Chancellor's decrees) that the 12,000*l.* consols secured by the mortgage to be replaced, were well bequeathed to make up the legacy of 15,000*l.* three *per cent.* consols.—*Collison v. Curling*, p. 88.

2. A testator gave all his real and personal estates to trustees; and as to his lands at *W.*, which he held in fee simple, he directed that the trustees should stand seised thereof, in trust to convey the same to *G. H. A.*, "when and as soon as he should attain his age of 21 years;" but in case he should die before he attained that age, without leaving issue of his body, then that the said lands at *W.* given and devised to him, should sink into the residue of the testator's real and personal estates: and he gave the residue to *J. C.* At the testator's death *G. H. A.* was only 12 years of age.

Held, that an equitable estate in fee in the lands at *W.* vested in *G. H. A.* immediately on the testator's death, liable to be divested in the event of his dying under 21 without leaving issue of his body.—*Phipps v. Ackers*, p. 583.

3. *E. C.* by his will, dated in 1786, gave his estate of *T.* to certain persons for life, and after their decease to his kinsman *J. C.*, or his male heir; and if no male heir lawfully begotten by the said *J. C.*, then the above lands to fall to the first male heir of the branch of his uncle *R. C.*'s family, yielding and paying to such of the daughters of the aforesaid *R. C.*, which should be then living, the sum of 100*l.* each, at the time of the taking possession of the aforesaid estates. The testator died in 1787; *R. C.* died six years before, having left five daughters only, all married: the eldest had several daughters, but no son; each of the others had sons; all these persons were known to the testator.

J. C. died in 1808, without having a son lawfully begotten.

The eldest daughter of *R. C.* died in 1799, having no son, but leaving a daughter who had a son, born in 1795, both still living.

The second died in *November* 1820, having had two sons; one born in 1763, who died in 1817; the second born in 1770, still living.

The third died in 1813, leaving two sons; one born in 1771, who died in 1813; the other born in 1773, still living.

The fourth died in 1804, leaving a son born in 1768, who died in 1819, having devised to his wife in fee.

The fifth, still living, had a son born in 1772, who is still living.

The life estate in the devised lands expired in July 1820.

Held, 1st. That the remainder devised to the first male heir of the branch of *R. C.*'s family, was a contingent remainder in fee simple.

2d. That such remainder, if once vested, could not become divested, so as to admit another in preference to him in whom it had vested.

3d. That the said remainder did not vest in *R. C.*'s second daughter's son.

Quære, as between the titles of the grandson of *R. C.*'s eldest daughter, and the son of *R. C.*'s fourth daughter?

Lord *Brougham* was of opinion, supported by five Judges:—

1st. That the words "first male heir," were not used by the testator to denote a person of whom an ancestor might be living, but meant an heir of a deceased ancestor in the technical sense.

2d. That the said remainder first vested in interest on the death of *R. C.*'s fourth daughter in 1804, in her son.

Lord *Cottenham*, supported by six Judges, was of opinion:—

1st. That the words "first male heir," were used to denote a person of whom an ancestor might be living.

2d. That the said remainder did not first vest in interest in *R. C.*'s fourth daughter's son. (His Lordship did not say when or in whom it vested: Two of these Judges said it vested in



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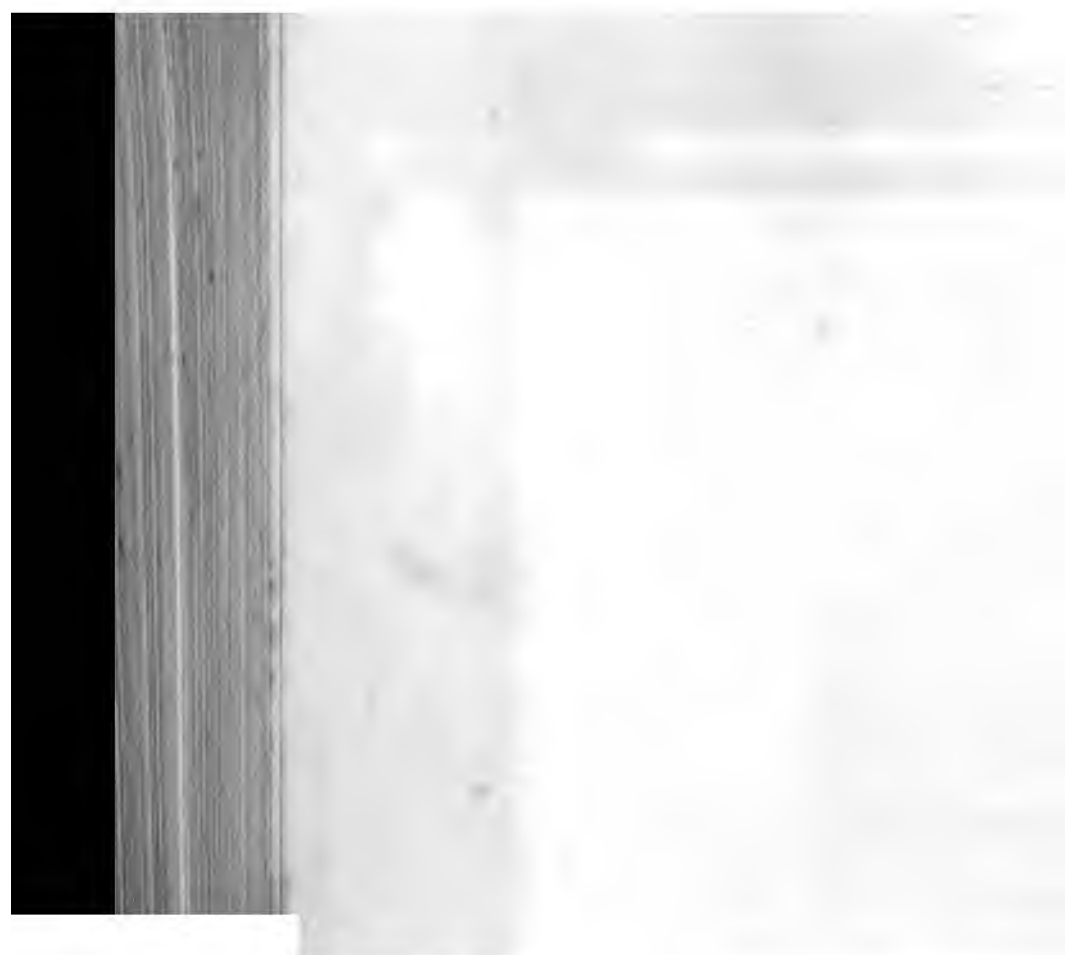
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